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IN THE

Supreme Court of the United States

October Term, 1980

No.

WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY D. LUECK,

Petitioners,

v.

FARRELL LINES, INC., and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

PETITION (WITH APPENDICES) FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Parties in the Court of Appeals

The parties named in the caption herein were the parties in the Court of Appeals for the Second Circuit. In addition to the parties named in the caption herein, the Brotherhood of Marine Officers, District 1, MEBA, AFL-CIO, and the AFL-CIO were also parties in the District Court. Neither appealed the order of the District Court at issue here and neither appeared in the Court of Appeals.

Question Presented

Where petitioners' employer is part of the American flag merchant marine fleet, declared by federal law to be part of the United States national defense, heavily subsidized as to ship construction and operation by federal funds, and subject to detailed federal regulation and overview of its operations, including the employer's shipping articles pertaining to individual contracts of employment and collective bargaining agreements, is the discharge by such employer of petitioners as deck officers, solely because of their refusal to join a union not certified, selected or otherwise established as representative of a majority of that employer's deck officers, governmental action subject to and in violation of the First Amendment to the United States Constitution?

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v.

FARRELL LINES, INC., and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit entered herein on May 12, 1980.

Opinions Below

The opinion of the District Court is reported at 477 F.Supp. 335 (S.D.N.Y. 1979), and is reproduced as Appendix ("App.") I, *infra,* at App. 1a-84a. The opinion of the

United States Court of Appeals for the Second Circuit is reported at 625 F.2d 379 (2d Cir. 1980), and is reproduced as Appendix II, *infra,* at App. 92a-141a.

Jurisdiction

The Court of Appeals for the Second Circuit rendered and entered its judgment, reversing the judgment of the District Court, on May 12, 1980. Petitioners' application for a rehearing with suggestion of rehearing en banc was denied on July 7, 1980. Petitoners' application for an extention of time in which to file this petition was granted on September 22, 1980, and their time to file a petition for writ of certiorari in this Court extended to and including December 4, 1980.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

1. First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. The Merchant Marine Act of 1936, as amended, 46 U.S.C. § 1101 *et seq.*, in relevant part:

> See Appendix III, *infra,* at App. 160a-192a.

3. National Labor Relations Act, § 2(3), as amended, 29 U.S.C. § 152(3):

> See Appendix III, *infra,* at App. 144a-145a.

4. National Labor Relations Act, § 9, as amended, 29 U.S.C. § 159:

See Appendix III, *infra,* at App. 145a-154a.

5. National Labor Relations Act, § 14(a), as amended, 29 U.S.C. § 164(a):

See Appendix III, *infra,* at App. 154a.

Statement of the Case

1. Preliminary Statement[1]

Petitioners, members of the Brotherhood of Marine Officers ("BMO"), commenced this action to challenge their discharge by respondent Farrell Lines, Inc. ("Farrell"), solely for their refusal to join a union, the International Organization of Masters, Mates and Pilots ("MMP"), which did not represent a majority of the Farrell employees in their job titles.[2] Petitioners are supervisory employees without recourse to the National Labor

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[1] The transcript and exhibits in the District Court are referenced as "T. " and "Exh. ," respectively; the Joint Appendix in the Court of Appeals, transmitted to this Court as the record in this case, is referenced as "JA. ." The appendix to this petition is referenced as "App. "

[2] At the trial plaintiffs made a showing, by way of a comprehensive statistical analysis of the extensive payroll and other data in evidence, that a majority of Farrell's deck officers belong to BMO, not MMP. JA. 501-04. MMP was afforded the opportunity to rebut that showing, but did not do so. JA. 644-45. The District Court, in the order reversed by the Court of Appeals, directed an election to determine whether MMP or BMO represented the majority of Farrell's deck officers. Our argument here proceeds on the assumption that BMO, not MMP, represented the majority of the Farrell deck officers. But even if the matter is in doubt, as the District Court apparently concluded, it still remains that MMP has not established majority status and absent such status all of petitioners' arguments concerning representation by and compulsory membership in a minority union are the same as they would be with respect to a union which has not been certified or otherwise established as the majority union.

Relations Board ("NLRB"). Petitioners asserted three claims in their complaint: (1) Farrell's discharge of petitioners violated rights conferred by contract and applicable federal law; (2) petitioners' union violated the duty of fair representation owed to petitioners when it failed to assert the constitutional and statutory rights of petitioners in an arbitration proceeding or in court; (3) Farrell's discharge of petitioners violated rights conferred by the First Amendment to the United States Constitution. This petition concerns only the third claim. The District Court had jurisdiction over this claim under 28 U.S.C. § 1331.

The District Court entered an interlocutory order, based solely upon the third claim, declaring that compulsory membership in MMP as a condition of Farrell employment violated petitioners' rights under the First Amendment if MMP did not represent a majority of the relevant deck officers employed by Farrell. The District Court premised this order on its finding that Farrell's conduct constituted governmental action. The District Court directed further proceedings to determine whether MMP represented such a majority. App. 31a-55a, 79a-84a.

Farrell and MMP appealed from the interlocutory order (JA. 52, 53, 55), which was reversed by the Court of Appeals for the Second Circuit. (App. 92a-141a). The Court of Appeals held that, though it was a "close" question whether governmental action was involved, the question was to be resolved contrary to the finding of the District Court and, further, that, even if Farrell's action was governmental, the dismissal of petitioners solely for refusal to join MMP did not violate their First Amendment rights. Petitioners moved the Court of Appeals for the Second Circuit for rehearing en banc (JA. 1346-59), which was denied (JA. 1361). The District Court then entered judgment dismissing all of plaintiffs' claims. JA. 1318-19. Petitioners have appealed

the District Court's dismissal of the two claims not implicated by the interlocutory order on this petition. JA. 1320. That appeal is now pending in the Court of Appeals for the Second Circuit.

2. Petitioners' Dismissal

BMO is a labor organization representing licensed deck officers and engineers in the American merchant marine. Each of the plaintiffs is a licensed deck officer and has been a long-standing member of BMO—as long as thirty-two years in the case of the petitioner Captain LoRe—during which time BMO has been their exclusive collective bargaining agent under a contract with American Export Industries, Inc. ("AEL").[3] App. 3a-4a, 278. MMP is a labor organization representing *inter alia* licensed deck officers in the American merchant marine.[4] MMP has represented and continues to represent licensed deck officers employed aboard Farrell ships. App. 4a. Neither BMO nor MMP has ever been certified as the collective bargaining representative of deck officers, those employees being supervisors excluded from the coverage of NLRA § 9, 29 U.S.C. § 159. App. 14a.

Farrell operates a shipping fleet in the United States merchant marine. From March 28, 1978 until their forcible

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[3] Two of the ten plaintiffs (Gardella and Bisbano) are licensed engineers who were joined in the ERISA claims presented by the original complaint. App. 56a-57a. The ERISA claims were eliminated from the amended complaint. App. 7a. The licensed engineers continue to be employed by Farrell pursuant to the BMO-Farrell collective bargaining agreement. Accordingly, the petitioners, as referred to collectively herein, include only the remaining eight licensed deck officers named as plaintiffs in the amended complaint.

[4] It was stipulated at trial that BMO and MMP both represented at least two employees as defined in National Labor Relations Act ("NLRA") § 2(3), 29 U.S.C. § 152(3), and that each was a labor organization within the meaning of the NLRA. JA. 1566.

discharge, Farrell had employed all of the petitioners on certain of its ships. App. 3a-4a.

In 1977 AEL filed a petition for an arrangement under Chapter XI of the Bankruptcy Act. Farrell purchased the stock of AEL in those proceedings and thereby acquired the fleet of international cargo ships owned or operated by AEL. App. 8a; JA. 678-79. The trial court found that on March 28, 1978 Farrell merged the former AEL fleet of 25 ships into its own fleet of 14 ships and commenced its operation on the international trade routes previously served by AEL. App. 8a-9a.

At the bankruptcy hearings on January 11, 1978 it was stipulated that "contractual arrangements . . . present with respect to the labor unions will continue along in the merged company. . . ." JA. 672. Upon its acquisition of AEL, Farrell executed an agreement, dated March 28, 1978, with BMO wherein Farrell assumed AEL's obligations under a collective bargaining agreement effective through October 15, 1981, and agreed to continue that AEL-BMO collective bargaining agreement in full force and effect with respect to the licensed deck officers employed on ships which Farrell acquired from AEL. App. 9a-10a; JA. 815. Subsequently, Farrell also entered into a collective bargaining agreement with MMP, effective June 16, 1978, with respect to the licensed deck officers employed on its original fleet. JA. 710, 713. Pursuant to a prior contractual provision (JA. 813), Farrell, as the employer of the BMO membership manning the vessels purchased from AEL, on November 22, 1978 entered into a modification of its collective bargaining agreement with BMO to provide improved wages and benefits[5] (JA. 816).

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[5] In the courts below MMP and Farrell sought to dismiss the described Farrell-BMO contracts as the result of alleged BMO strike threats and in contemplation of an AFL-CIO Article XX arbitration.

In April 1978 MMP, by its parent, the International Long-Shoremen's Association ("ILA"), initiated proceedings before the AFL-CIO under Article XX of the AFL-CIO Constitution, claiming entitlement to represent all licensed deck officers employed on all vessels owned and operated by Farrell. JA. 683-84. A month later, BMO's AFL-CIO affiliate, defendant MEBA, asserted a similar right on BMO's behalf. Proceedings then ensued before a hearing officer appointed by the AFL-CIO, who rendered a decision which was thereafter appealed to the Executive Council of the AFL-CIO. That appeal was decided finally on or about February 28, 1979, when defendant AFL-CIO ruled that MMP was to represent all licensed deck officers employed by Farrell.[6] App. 10a-11a. MMP then demanded of Farrell, by letter dated March 6, 1979, that it recognize MMP as the exclusive bargaining representative of all licensed deck officers in its employ and implement its collective bargaining agreement accordingly, effective March 5, 1979. JA. 874-75.

The evidence is to the contrary. BMO never struck or picketed Farrell. BMO first wrote in January 1978 that it would take action, in connection with the bankruptcy proceeding, to enforce the BMO-AEL contract (JA. 650-51), and then, after that proceeding, wrote that, in reliance upon the stipulation wherein the "contractual arrangements" with BMO were to "continue along," BMO hoped it was not necessary to take other action (JA. 681). Neither BMO nor MMP was willing to execute the written agreement, proposed by Farrell, to be bound by an Article XX award. JA. 647-51. And the contracts between Farrell and BMO made no provision for termination prior to October 15, 1981 by reason of an Article XX award or otherwise. JA. 367-68.

[6] The issue whether BMO or MMP represented a majority of the Farrell deck officers, or the legal implications thereof, was not raised or considered in the Article XX proceedings. It was, in fact, specifically urged by ILA that "no election may be obtained . . . through Article XX." JA. 1546. It was also specifically represented by ILA in those proceedings that no BMO deck officers would be displaced if ILA prevailed. JA. 1535-37, 1547.

Farrell was not a party to the Article XX proceeding and had no interest in the outcome. Farrell did not care which union represented its deck officers and was willing to accept either BMO or MMP as a collective bargaining representative. App. 70a; JA. 406. Nonetheless Farrell acquiesced in the MMP demand.

On or about March 12, 1979, Farrell notified all BMO members employed aboard its vessels that as a condition of further employment they would be required to become members of MMP and that the collective bargaining agreement between BMO and Farrell was no longer effective. Farrell indicated that it would apply only the terms of the MMP agreement with respect to all licensed deck officers in its employ, and that its contributions to the BMO employee benefit and pension funds would cease immediately. JA. 692-93.[7] Consequently, when BMO deck officers returned from voyages after March 5, 1979, MMP required them to obtain their vacation pay, comprising about 40% of their total pay (J.A. 358-59), at the MMP offices and with MMP dues of 5% deducted therefrom.[8] T. 502, 507-09, 514; Pl. Exh. 59.

The Staghound was the first former AEL ship to return to the United States after the decision of Farrell to abrogate the BMO collective bargaining agreement in compliance with MMP's demand. On March 14, 1979, when the

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[7] The health, welfare, pension benefits and vacation pay of BMO members at sea were paid to MMP from March 5, 1979, pursuant to the terms of the Farrell-MMP collective bargaining agreement, without the consent of the deck officers and without regard to whether they joined MMP, despite the fact that these deck officers had signed articles incorporating the terms of the BMO collective bargaining agreement prior to their departure from ports in the United States. JA. 361-62.

[8] MMP dues for six months of seagoing employment were $150 plus $450 to $1,000, depending on rank and salary. JA. 731-33, 756-57. BMO dues were $246. T. 514.

Shipping Commissioner, a United States Coast Guard official, came aboard the Staghound to obtain the crew's signature on articles for its next foreign voyage, petitioners sought to sign on. The Shipping Commissioner refused, however, explaining that Farrell had instructed him not to sign articles for those deck officers. JA. 262-65.

Farrell wanted the experienced BMO crew, which brought the ship to port, to man her on the scheduled foreign voyage. If the crew had agreed to join MMP, they would have been permitted to sign foreign shipping articles and would have continued their employment. JA. 310, 312, 369-70. Farrell, however, succumbed to the demand of MMP and refused to permit petitioners to sail with the Staghound when they declined to join MMP. App. 11a; JA. 312-13. On March 15, 1979, those deck officers who sought to sail but would not join MMP were arrested by police and taken off the Staghound shackled together in handcuffs. JA. 266-67, 279-82.

By letter dated March 19, 1979, the president of MMP, Robert J. Lowen, advised each licensed deck officer on ships acquired from AEL represented by BMO that he must join MMP "to remain employed." JA. 789. The ultimatum was presented to each former AEL ship manned by the BMO as it arrived in a United States port. Those deck officers who refused to join MMP were removed from their positions. BMO members who joined MMP were permitted to continue their employment, but under the terms of the MMP collective bargaining agreement.[9] App. 11a-12a.

[9] In addition to joining MMP, the BMO deck officers were required to pay dues to MMP (JA. 880), and, after May 8, 1979, to pay MMP's $3,000 initiation fee (Pl. Exh. 75). Continued BMO membership put one's MMP membership and employment at high risk since the MMP Constitution forbids dual union membership except by written permission at the highest MMP level for a limited time (App. 66a-67a), and it does not appear that such permission had been provided for petitioners or other BMO officers after March 1979 (T. 541).

Under the MMP contract, second and third mates would be hired only through the MMP hiring hall instead of through the BMO seniority list (T. 473-74), a circumstance which meant an average reduction of more than 20% in paid working status during the year (Pl. Exh. 63, 70) and that in the MMP hiring hall the former BMO deck officers would be at a severe competitive disadvantage.[10]

3. Farrell's Action as Governmental Action

Farrell is part of the American flag merchant marine fleet. Accordingly, the capital necessary to construct and operate Farrell's ships is overwhelmingly provided by the federal government. JA. 467, 1302-03.[11] As a condition of eligibility for the Operating Differential Subsidy ("ODS")

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[10] Former BMO deck officers would be initially placed at the lowest, Class C, level in consideration for non-Farrell berths at the MMP hiring hall, no matter the length of prior licensed seagoing experience. JA. 876. Few Class C deck officers obtained jobs in the MMP hiring hall. Pl. Exh. 66. Former BMO deck officers were offered Class A status in competing for Farrell berths on former AEL ships (JA. 876), but they would have to compete with all other MMP Class A deck officers for such berths rather than having the assured berths provided by the BMO seniority list (T. 474) and it was within the discretion of MMP whether even such limited Class A status would continue for any former BMO deck officer who took a non-Farrell job through the MMP hiring hall (T. 549-50).

[11] The cost of construction of the Farrell fleet paid by the United States equals close to $262.5 million, approximately one-half that sum for ships owned by Farrell prior to the acquisition of AEL. App. 80a; JA. 1302-03. Each Farrell ship was built under a contract with the United States Secretary of Commerce pursuant to which the federal government paid approximately 50% of the purchase price. App. 37a-38a, 80a; JA. 1302-03. The balance of the purchase price was provided by government guaranteed mortgages and profits deposited in a fund and on which taxes were deferred. App. 37a-38a, 80a; JA. 472. Farrell is reimbursed for approximately 60% of the collective bargaining costs resulting from the employment of American citizen crews—*i.e.*, wages and fringe benefits as determined by collective bargaining contracts between Farrell and the maritime unions. App. 37a-38a, 79a-80a; JA. 467. In calendar year 1978, under AEL's and its own federal subsidy agreements, Farrell received in excess of $56 million from the Federal Government. App. 80a.

program, governing the operational subsidization contracts between Farrell and the United States, Farrell was required to demonstrate that absent these funds it could not successfully compete with foreign flag ships.[12] 46 U.S.C. § 1172. Farrell thereby acknowledged its dependency upon federal financial support for the operation of its fleet.

Each of Farrell's vessels, both those acquired from AEL and those previously operated by Farrell, was built to design specifications set by the Secretaries of Commerce and the Navy incorporating features mandated for speedy conversion from trade to national defense use, and each ship's design must be approved by both those departments. 46 U.S.C. § 1151.

Farrell's entire fleet is operated under two elaborate ODS agreements with the United States Department of Commerce, one covering its own fleet and one covering ships acquired from AEL. JA. 454, 461, 465, 882, 1003. Pursuant to these contracts, the government determines the route on which each vessel will operate, the frequency of sailings, and the ports of call on each voyage. JA. 886-89, 903-05, 1006-26. Any change in the route or sailing schedule requires government approval. JA. 889, 995-1001, 1030. If Farrell wishes to use its ships in other than foreign trade, it must repay to the United States the sums expended for their construction. 46 U.S.C. § 1156; see also *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572 (1980).

The government sets minimum manning, wage scales, and working conditions on Farrell ships (JA. 892, 909-12, 924-27, 1069-71, 1237), and must approve the actual salaries paid as the basis for determining the operating subsidy

[12] Each of the ODS contracts recites that such required findings were made (JA. 885, 1005), and that the subsidy is necessary to meet foreign competition (JA. 916, 1059-60, 1178-79). *See* 1970 U.S.C. Cong. & Admin. News ("CC&AN") at 4188, 4190.

paid to Farrell (JA. 465; see also 46 U.S.C. § 1173). And pursuant to the ODS agreements, Farrell must, upon request of the United States, carry up to three government representatives on board its ships to monitor operations. JA. 934, 1079-80, 1198-99.

Farrell's contract with the United States sets forth Farrell's obligation regularly to replace the vessels in its fleet and departure from the replacement schedule requires government approval. JA. 893-97, 913, 969, 980, 1038-46, 1220. Farrell is required to follow a conservative dividend policy, to notify the United States of its intention to declare dividends, and not to effect any merger or consolidation, or effect any acquisition or disposition of its assets, or embark on any new enterprise not directly connected with shipping. JA. 932, 939-40, 1091-92, 1210-11. Farrell cannot transfer the maintenance, management or operation of any vessel or service covered by the contract without the consent of the United States. JA. 929-30, 932, 1075, 1077-78, 1194, 1196-97. The sale of AEL's vessels to Farrell and the assignment of AEL's ODS to Farrell required and received government approval. JA. 675, 989, 1262-65. If Farrell defaults in any of its obligations to the United States, the United States has the right to supervise the number and compensation of its officers and employees. 46 U.S.C. § 1223(b); JA. 927, 1191. Government auditors regularly audit Farrell's performance under the ODS. JA. 377, 932-34, 1078-80, 1197-99.

The Merchant Marine Act, which is the statutory predicate for Farrell's ODS contracts, declares it necessary to the national defense that the United States have a domestic merchant marine capable of serving as a naval and military auxiliary in time of war or national emergency. 46 U.S.C. § 1101.

> "From this declaration it is apparent that the United States, in the maintenance and operation of

> the merchant marine, is not engaged in a purely commercial enterprise, but that, on the contrary, Congress conceived that the establishment and operation of the merchant marine was the exercise of a governmental function of the highest importance, . . ." (*The Coldwater,* 283 Fed. 146, 148 [S.D. Fla. 1922]).

A 1970 Senate Report explains that the primary impetus for the original Merchant Marine Act was the inability of the United States to meet its defense needs in World War I. CC&AN at 4188-89. The system of subsidization and government control under which Farrell operates evolved to meet these needs. *Ibid.* The 1970 Senate Report describes the merchant marine as "our fourth arm of defense." *Id.* at 4190. Whenever the Secretary of Commerce determines that private enterprise under the construction and operating differential subsidy programs is inadequate to accomplish the program of establishing and operating a merchant marine, the Secretary is directed to complete the program. 46 U.S.C. § 1191. The Secretary may, on account of the United States, have ships constructed and may charter them to private operators for a fixed sum for operation on the essential trade routes.[13] 46 U.S.C. §§ 1192, 1204.

The Department of Commerce has described the relationship between the United States and, the American flag merchant marine fleet, which includes Farrell, as a partnership, stating that "[t]he government is in fact a partner in such operations. . . ." Recommendations of the Department of Commerce and the Maritime Administration, Senate Committee on Interstate and Foreign Commerce, 82nd

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[13] At the time of the Farrell acquisition of AEL, three ships (the Defender, Diplomat and Democracy) were owned by the United States and were operated under charter from the United States. JA. 337, 418. Two of these ships continued to be operated by Farrell after the take-over and Farrell received operating differential subsidies for the voyages they made. Pl. Exh. 47, Sched. B1-3-6, sheet 3; Sched. B1-2-0, sheet 3.

Cong., 1st Sess., 1 (1951). Farrell is expressly obligated to "cooperate with the United States and with other American-flag companies in the development of the American-flag Merchant Marine as a whole. . . ." JA. 918.

The United States was also involved in the specific actions of Farrell of which petitioners complain. The approval of the Maritime Administration was required for Farrell's acquisition of the AEL fleet and its assumption of rights under AEL's ODS contract. JA. 675. The Secretary of Commerce must review Farrell's collective bargaining agreements, including those with BMO and MMP, and determine that they are fair and reasonable and the product of *bona fide,* arm's length collective bargaining. 46 U.S.C. § 1173(b). Petitioners served on each voyage pursuant to a government mandated contract of employment—foreign shipping articles. By statute, at the time of the acts here complained of, these articles were required to be signed in the presence of the Shipping Commissioner and bear his certification and seal. 46 U.S.C. §§ 564-65, 713. Farrell was able to replace petitioners on board the Staghound and other former AEL ships only with the active participation of the Shipping Commissioner, a United States Coast Guard official, who, pursuant to Farrell's direction, refused to permit petitioners to sign articles, permitting only MMP members to sign on the crew. JA. 263-64.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Finding That Farrell's Conduct of Which Petitioners Complain Was Not Governmental Action Sufficient to Invoke the Protection of the First Amendment, is Inconsistent With Applicable Decisions of This Court and of Other Courts of Appeals.

In our view, the Court of Appeals has invited this Court's review of the governmental action issue posed here.

The underlying concept is described as "a blurred one that the Supreme Court itself has had trouble clarifying." App. 111a. At another point the "nexus" test language of *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974) ("*Metropolitan Edison*"), is said to be "less than clear." App. 140a. And the Court of Appeals acknowledged that its own decisions diverge on the issue whether the nexus test of *Metropolitan Edison* and the "symbiotic relationship" test of *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961) ("*Burton*"), are separate or essentially the same. App. 140a-141a. The propriety of resolving and clarifying the matter in this case is suggested by reference by the Court of Appeals to "this close case" (App. 115a), and that court's comment that the "question is a close one" which "reasonable judges readily decide . . . another way" (App. 125a); "[o]ne must 'divide/A hair 'twixt south, and south-west side' to determine" the issue (App. 120a).

The decision below was contrary to this Court's decisions on the proper application of the tests to determine what action constitutes governmental action. This Court has never applied the "nexus" requirement of *Metropolitan Edison* when analyzing governmental action under the "symbiotic relationship" test of *Burton*. But the Court of Appeals did precisely that here. Two distinct, alternative requirements, each of which had previously been separately held sufficient to find governmental action for constitutional purposes, were imposed in the aggregate as a condition to finding Farrell's conduct to be governmental action. App. 113a-125a. Thus the Court of Appeals required express government approval of the precise actions of Farrell here challenged to find that Farrell's conduct was governmental action. App. 124a-125a.

In *Burton*, of course, this Court required no "nexus" between Eagle's discriminatory conduct and any action of

the government. This Court expressly held that the complete absence of any involvement of the government in the precise discriminatory conduct of which the plaintiffs complained was not relevant to the issue of state action. *Id.* at 725. The private actor's relationship to the government, without more, rendered it subject to constitutional constraints.

In addition, contrary to the express teaching of this Court in *Burton* that the elements of government involvement were to be considered in the aggregate (365 U.S. at 724), the Court below here considered each element in isolation and failed to consider the combined effect of the various elements which it individually dismissed as insufficient to find governmental action. The District Court had considered the elements of governmental involvement with Farrell in the aggregate. App. 36a. Nonetheless, the Court of Appeals dismissed, *seriatim,* the "substantial governmental funding" of Farrell, the "commonality of economic interests" between Farrell and the United States, and the government's "extensive and detailed regulation of the private conduct." App. 121a-123a.

Viewed in its entirety, and not just piece-meal, the intertwining of Farrell and the United States meets every test of government action established by this Court. The joinder of both extensive subsidization [14] and detailed regulation [15] of Farrell by the United States (see *supra* at

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[14] By 1900 the American merchant marine was virtually extinct. Gilmore & Black, *The Law of Admiralty* 965 (2d ed. 1975). Thereafter the American merchant marine has either been operated directly by the United States (see, e.g., 39 Stat. 728 [1916], 41 Stat. 988 [1920], 7 Fed. Reg. 837 [1942]) or subsidized by it (see Gilmore & Black, *op. cit. supra,* at 968-80).

[15] There is probably no American industry which is and, historically, has been more extensively regulated and controlled by government than the merchant marine. See Gilmore & Black, *op. cit. supra,* at 958-59, 962-63, 986-96.

10-14), amounts to the symbiotic relationship contemplated by *Burton*. The integral national defense role of the American flag merchant marine, of which Farrell is a part (see *supra* at 12-13), meets the "public function" test referred to in *Metropolitan Edison, supra,* 419 U.S. at 352; see also *Flagg Bros. Inc.* v. *Brooks,* 436 U.S. 149, 163-64 (1978). And the connection between federal regulation and personnel, and the challenged dismissal of petitioners (see *supra* at 14), fulfills the *Metropolitan Edison* nexus test. The decision below therefore is in conflict with this Court's decisions in the subject area.

The decision reached below was also contrary to the decisions of the Courts of Appeals for the First, Third, and Fifth Circuits on the issue presented. *McQueen* v. *Druker,* 438 F.2d 781 (1st Cir. 1971) (*"McQueen"*); *Braden* v. *University of Pittsburgh,* 552 F.2d 948 (3d Cir. 1977) (*"Braden"*); *Wimbish* v. *Pinellas County, Florida,* 342 F.2d 804 (5th Cir. 1965) (*"Wimbish"*); *Hampton* v. *City of Jacksonville,* 304 F.2d 320 (5th Cir. 1962), *cert. den.* 371 U.S. 911 (1962) (*"Hampton"*).

In *McQueen* the First Circuit held that the refusal to renew a tenant's lease by a private landlord, who had constructed a housing facility on land purchased from a city redevelopment authority, and who operated the facility pursuant to a land disposition agreement with the City, was subject to the Due Process Clause of the Fourteenth Amendment. Like the Merchant Marine Act and the ODS agreements in the instant case, the land disposition agreement in *McQueen* restricts the landlord's operation of his business in important respects, limits his financial exposure, requires prior government approval for construction, and restricts his selection of tenants and the terms of his rental agreements. In *McQueen,* as here, "the government has chosen to attract the participation of private persons in carrying out a specific governmental purpose." 438 F.2d at 784.

> "[A]t least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches." (*Id.* at 784-85)

In *Braden* the actions of a private university which received substantial state funding, over which the state exercised significant oversight functions, and where the state appointed one-third of the members of the Board of Trustees, were held by the Third Circuit to be state action. 552 F.2d at 959-60. There the state was attempting to serve a governmental function—increasing the opportunity for higher education of Pennsylvania residents—by becoming a "joint participant" with a private university. *Id.* at 961-62. "In exchange for public funds, Pitt agreed to submit to stringent regulations of its fiscal and other affairs." *Id.* at 960 (footnote omitted). In *Braden* and *McQueen,* as in the instant case, the government has pursued a governmental purpose through subsidization and substantial control over the operations of a private entity. The First and Third Circuits found such to be state action subject to constitutional constraints despite the lack of any "nexus" between the actions of government and the conduct of the private actor of which the plaintiff complained.

In *Wimbish,* the Fifth Circuit held that the conduct of a long-term lessee who undertook to improve the leased property in order to operate it as a golf course was governmental action, where the plans for improvement and the prices charged for use of the course were subject to the approval of the county. *Id.* at 805-06. The Court found the lessee's discrimination on the basis of race to be state action

notwithstanding that the county had not discriminated in any way, had not approved the discrimination, or had any discriminatory purpose when it executed the lease. *Id.* at 806. In *Hampton,* the Fifth Circuit similarly held that when the City of Jacksonville sold a golf course to a purchaser on favorable terms, and provided through a reversionery clause that it must be maintained as a golf course, the purchaser's conduct was state action. 304 F.2d at 320-21.

The Court of Appeals decision in the instant case was inconsistent with the decisions of the Courts of Appeals in several other Circuits, as well as contrary to the governmental action analysis of this Court in *Burton.* Such a departure from traditional jurisprudence warrants review by this Court. In any event, the importance of the issue and the Second Circuit's acknowledged lack of clarity with respect thereto, makes this an appropriate occasion for this Court's review.

II.

The Decision Below, Holding That a Governmental Employer Could, Consistent With the First Amendment, Compel Membership in a Union Not Certified, Selected or Otherwise Established as Representative of the Majority of the Relevant Employees, as a Condition of Continued Employment, is Either Contrary to the Decisions of This Court or Presents an Important Federal Question That Should Be Decided by This Court.

Petitioners were discharged by Farrell solely for their refusal to join MMP. This was undisputed at trial and found by both courts below. App. 13a, 98a. The District Court held that when a governmental employer chooses to recognize a bargaining representative for its supervisory employees, regardless of whether it was required to do so, the union recognized must be that selected by a majority of those supervisory employees. App. 52a. The District Court based this upon the First Amendment guarantee of freedom of association. App. 41a-52a.

The Court of Appeals for the Second Circuit held, contrary to the District Court, that "the Constitution poses no inherent barrier to [governmental] employers who wish to recognize any union they choose. . . ." App. 129a. According to the Court of Appeals, absent a specific statutory proscription, there is no constitutional constraint upon a governmental employer who, as a condition of employment, compels membership in a union not chosen by a majority of the employees it represents, or who discharges an employee for refusal to join such a union. This decision, divesting governmental employees of protection under the First Amendment for their refusal to join a particular union, presents an important issue of federal constitution law that should be decided by this Court, if not already resolved by

prior decisions of this Court contrary to the determination of the Second Circuit here.

The Court of Appeals relied upon *Hanover Township Federation of Teachers Local 1954* v. *Hanover Community School Corp.*, 457 F.2d 456 (7th Cir. 1972) (*"Hanover"*), for the proposition that there is no constitutional constraint upon a governmental employer's recognition of any union it chooses. App. 129a. But that case criticizes and does not authorize dismissal of public employees for joining or refraining from joining a union.[16] As Judge (now Justice) Stevens stated in that case when a member of the Court of Appeals for the Seventh Circuit:

> "the courts . . . have accepted a general proposition that public employees cannot be discharged for engaging in union activities. Thus, if there is a discharge because of union membership, the general constitutional right of free association, as recognized in NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488, and Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, and the free speech right recognized in Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811, are correctly applied to invalidate the discharge, since there is no reason to distinguish a union from any other association." (457 F.2d at 460) (footnotes omitted).

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[16] In *Hanover* the trial court, on constitutional grounds, ordered the offer of contracts to nine teachers terminated because of their union activities. See 457 F.2d at 459. Although no appeal was taken from this order, Judge Stevens noted that the order was consistent with prevailing authorities (*id.* at 460) and also indicated that like relief was available in the event of future retaliation for union membership (*id.* at 462-63).

If the Constitution proscribes the discharge of a public employee because of his membership in a union, it must certainly protect an employee discharged for his refusal to join a union.[17] This follows from this Court's recognition that "the law which normally is reflected in our free institutions [is] the right of the individual to join or to resign from associations, as he sees fit. . . ." *Machinists & Aerospace Workers* v. *NLRB,* 412 U.S. 84, 88 (1973). The particular application of this principle to the right to join a union, as an aspect of the First Amendment freedom of association, is long and well-settled. See, *e.g., NLRB* v. *Allis Chalmers Mfg. Co.,* 388 U.S. 175, 180 (1967); *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958); *Thomas* v. *Collins,* 323 U.S. 516 (1945); *United Federation of Postal Clerks* v. *Blount,* 325 F.Supp. 879, 883 (D.D.C.), *aff'd* 404 U.S. 802 (1971); *NLRB* v. *Jones & Laughlin Steel,* 301 U.S. 1, 32 (1937); *Police Officers' Guild* v. *Washington,* 369 F.Supp. 543 (D.D.C. 1973). That freedom includes the right not to be compelled by government to join a group against one's will. *See Abood* v. *Detroit Board of Education,* 431 U.S. 209, 222 (1977); *cf. Wooley* v. *Maynard,* 430 U.S. 705, 714 (1977).

If union membership is, as indicated, a First Amendment associational right like other First Amendment associational rights in nature and stature, it is governed by the line of cases from *Elrod* v. *Burns,* 427 U.S. 347 (1976), to *Branti* v. *Finkel,* 445 U.S. 507 (1980).[18] Those cases

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[17] In the instant case both joining and refraining from joining a union are involved since continued membership in BMO by petitioners, even if they were to join MMP, would be incompatible with MMP membership and continuing eligibility for Farrell employment. See *supra* at 9 n. 9.

[18] In *Branti* v. *Finkel, supra,* six members of this Court adopted the position enunciated by the plurality opinion of Mr. Justice Brennan in *Elrod* v. *Burns, supra.*

specify that where an employee's dismissal is predicated upon associational membership or non-membership, as here, the interest served by the requirement of membership or non-membership "must be paramount, one of vital importance, and the burden is on the government to show the existence of such an interest." *Elrod* v. *Burns, supra,* 427 U.S. at 362; *Branti* v. *Finkel, supra,* 445 U.S. at 515-16.

> "[I]t must further some vital governmental end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." (*Elrod* v. *Burns, supra,* 427 U.S. at 363).

The tests thus prescribed by this Court are clearly not met here.

Wherever this Court has sustained the constitutionality of legislation authorizing compulsory union membership, it has done so only in the context of a mechanism to assure majority selection and representation. *Railway Employees Dept.* v. *Hanson,* 351 U.S. 225 (1956) ("*Hanson*"); *International Association of Machinists* v. *Street,* 367 U.S. 740 (1961) ("*Street*"); *Abood* v. *Detroit Board of Education, supra* ("*Abood*"). In each case, the statutory purpose to promote effective collective bargaining by a union selected by the majority of those in the bargaining unit was deemed sufficient to override the associational interests of a minority of employees.

In *Hanson,* this Court stated:

> "Congress has authority to adopt all appropriate measures to 'facilitate the amicable settlement of

> disputes which threaten the service of the necessary agencies of interstate transportation.' *Texas & N.O.R. Co.* v. *Railway Clerks,* 281 U.S. 548, 570. These measures include provisions that will encourage the settlement of disputes 'by inducing collective bargaining with the *true representative of the employees and by preventing such bargaining with any who do not represent them* (*Virginian R. Co.* v. *Federation,* 300 U.S. 515, 548), and that *will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation.' Labor Board* v. *Jones & Laughlin,* 301 U.S. 1, 33." (351 U.S. at 233) (emphasis added).

In *Abood,* this Court again reviewed the issue of compulsory union membership and concluded that the judgment made in *Hanson* and *Street* is "that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." 431 U.S. at 222. The Court carefully compared the scheme and purpose of the applicable Michigan laws and concluded that they were very like the federal labor laws in their provisions regarding the certification of an exclusive bargaining representative by a majority of those represented, and therefore constitutional. *Id.* at 223-24.

The compulsory membership requirement imposed by Farrell serves no substantial governmental purpose. In the first instance, the action of Farrell and MMP here challenged cannot be deemed, in form or purpose, the equivalent of legislation which compels union membership in the service of some substantial public interest. Indeed, unlike the cases in which compulsory union membership was upheld,

Farrell is not even subject to a comprehensive legislative scheme in which selection of an exclusive bargaining representative is designed to facilitate the amicable settlement of labor disputes. As this Court emphasized in *Hanson* (351 U.S. at 233), compulsory union membership will contribute to the maintenance of industrial peace only when the union is the "true representative" of the employees—one selected by a majority of those in the bargaining unit. Compelling membership in a union not selected by a majority of those in the bargaining unit will not encourage industrial peace.

Babbitt v. *United Farm Workers National Union,* 442 U.S. 289 (1979) (*"Babbitt"*), *Smith* v. *Arkansas State Highway Employees, Local* 1315, 441 U.S. 463 (1979) (*"Smith"*), and *Lathrop* v. *Donohue,* 367 U.S. 820 (1961) (*"Lathrop"*), relied upon by the Court below (App. 127a-129a), are not to the contrary. None of these cases involve the issue presented here—compulsory membership in a non-majority union. In *Babbitt* and *Smith,* this Court reaffirmed the constitutional right to join a union, which subsumes the correlative right not to join, and then went on to hold that there was no constitutional duty for government to bargain collectively with a union or to assure that collective bargaining was effective. *Babbitt, supra,* 442 U.S. at 313;[19] *Smith, supra,* 441 U.S. at 465. And this Court held in *Abood* that *Lathrop* "does not provide a clear holding to guide us in adjudicating the constitutional issues here presented" of compulsory union membership as a condition of public employment. 413 U.S. at 233 n.29.

The other considerations cited by the Court of Appeals here do not meet the substantial interest or least restrictive

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[19] The Arizona statute challenged in *Babbitt* expressly provided for majority selection of a bargaining representative. 442 U.S. at 294 n.4.

means tests set by this Court in *Elrod* v. *Burns*. The Article XX award, by which the Court of Appeals, as it recognized, was not bound (App. 135a), was not intended to and cannot substitute for or supersede majority rule. *International Brotherhood of Teamsters* v. *International Union of United Brewery Workers*, 106 F.2d 871 (9th Cir. 1939); see also, *Glendale Mfg. Co.* v. *Local 520*, 283 F.2d 936 (4th Cir. 1960), *cert. den.* 366 U.S. 950 (1961); *General Warehousemen & Helpers Local 767* v. *Standard Brands, Inc.*, 579 F.2d 1282 (5th Cir. 1978); *Boire* v. *Int'l Brotherhood of Teamsters*, 479 F.2d 778 (5th Cir. 1973); *cf. Local 453* v. *Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963), *cert. den.* 373 U.S. 949 (1963). The so-called maritime "accretion doctrine" referenced by the court below (App. 134a), is applied in the context of unions duly certified as majority representatives subject to decertification election if not so representative (29 U.S.C. §§ 159 [a], [c], and [e] [1]).[20] The risk cited by the Court of Appeals (though not by the parties) of new elections at every change of deck officer personnel (App. 135a-136a) is obviated here, as elsewhere in labor matters, by ordinary contract bar considerations (see American Bar Association, Labor Relations Law Section, *The Developing*

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[20] Here second and third mates were relegated to the MMP hiring hall where, pursuant to the pre-existing MMP-Farrell contract, MMP membership was the condition for referral. See *supra* at 10n. 10. But hiring halls, generally, may not condition referral for employment upon union membership. American Bar Association, Labor Relations Law Section, *The Developing Labor Law* (1971) 712-15; (1971-75 Supp.) 376-80; (1977 Supp.) 223-25. This rule obtains as well for maritime hiring halls. *NLRB* v. *International Longshoremen's Union, Local 13*, 549 F.2d 1346 (9th Cir. 1977) (see cases cited at 1353), *cert. den.* 434 U.S. 922 (1977). And the sole instance of authorization of a pre-hire collective bargaining agreement is in the construction industry where the NLRA expressly permits a pre-hire union contract. NLRA § 8(f), 29 U.S.C. § 158(f). But, even in the construction industry, this Court has held such a contract unenforceable unless and until that union achieves majority support. *NLRB* v. *Iron Workers*, 434 U.S. 335 (1978).

Labor Law, ch. 8, § 11 E; *cf.* 29 U.S.C. § 159[c][3] [one year statutory bar]).[21]

And the Circuit Court's concern that if BMO won the election ordered by the District Court, MMP members might lose their benefits under the MMP-Farrell collective bargaining agreement (App. 136a) overlooks the circumstance that the District Court Judge did not specify what relief, if any, he would order if BMO won the election, other than declaring that petitioners could not be required to join MMP as a condition of Farrell employment. The District Court did not determine which contract would govern the terms of employment (or whether the situation should be returned to the *status quo ante* when BMO represented deck officers on the former AEL ships and MMP represented deck officers on all other Farrell ships) and the status of the terms of the MMP-Farrell contract was not otherwise directly implicated by the District Court.[22]

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[21] Under the NLRA the concern cited by the court below would not have precluded the election process ordered by the District Court. If petitioners were statutory employees, in the precise circumstances of the Farrell take-over of the AEL ships, BMO could have required an immediate election. Farrell's contract with MMP expired on June 15, 1978. Pl. Exh. 57. Thus, when Farrell acquired the AEL fleet in March, 1978, Farrell, MMP, BMO or petitioners would have had the right thereupon to petition for an election to determine by majority vote whether BMO or MMP represented a majority of Farrell's deck officers. See *Leonard Wholesale Meats, Inc.*, 136 NLRB No. 103, 49 LRRM 1901 (1962). Under NLRB practice, the June 16, 1978 MMP-Farrell contract, expiring June 15, 1981, would not give rise to a contract bar to an election in view of the BMO-Farrell contract of March 28, 1978 and modification of November 22, 1978. *Longview Terrace Co.*, 208 NLRB No. 78, 85 LRRM 1267 (1974); *Portland Associated Morticians, Inc.*, 163 NLRB No. 76, 64 LRRM 1402 (1967); *Deluxe Metal Furniture Co.*, 121 NLRB No. 135, 42 LRRM 1470 (1958).

[22] Farrell entered into separate contracts recognizing BMO and MMP, and bargained with both unions. Farrell had expressly stated that it did not care which union represented petitioners. App. 70a. The District Court ordered an election solely with respect to the issue of conditioning employment on union membership.

The most pervasive error of the Court of Appeals on the First Amendment issue here raised was its perception that that issue is governed by the supervisory status of petitioners and their non-coverage under the NLRA. App. 126a-128a, 131a, 135a-136a. But petitioners have not claimed that the First Amendment compels Farrell to bargain with a union of supervisors under the NLRA or otherwise. Instead petitioners assert by reason of the First Amendment, only their right not to be compelled by Farrell to joint a non-majority union as a condition of Farrell employment, a right which extends to supervisors as well as all others subject to governmental action.[23]

The holding of the Court below, that a governmental employer can, consistent with the First Amendment, compel membership in a non-majority union of the employer's

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[23] That petitioners are supervisors is not relevant to the constitutional issue here presented. NLRA §§ 2(3) and 14(a), 29 U.S.C. §§ 152(3) and 164(a), divest supervisors of the protections afforded to statutory employees by the NLRA. But those sections of the NLRA do not relieve Farrell of the constitutional restrictions to which it would otherwise be subject. Even if Farrell's conduct were not subject to constitutional constraints, those sections would not authorize Farrell's conduct of which petitioners complain. NLRA § 14(a) permits a private employer to prohibit union membership by the employer's supervisors. But it in no way authorizes an employer to require membership in a minority union selected by the employer as a condition of employment. This Court recognized the fundamental distinction between an employer's conditioning employment upon membership or non-membership in a union in *Beasley* v. *Food Fair of North Carolina Inc.*, 416 U.S. 653 (1974) (*"Beasley"*). That case involved supervisors discharged by a private employer for union membership. This Court expressly distinguished and did not reach the case that would be presented here even if Farrell's conduct were not subject to constitutional constraints—where a supervisor is discharged for non-membership in a particular union. Id. at 622 n.7. The thrust of the supervisory exclusion according to *Beasley* is recognition of the right of the employer to the free and unfettered choice of its supervisors (416 U.S. at 657-62), and that objective is not furthered by Farrell's requirement that only MMP members serve as Farrell deck officers.

choice as a condition of continued employment, is of broad potential impact. It divests governmental employees of protection under the First Amendment for their refusal to join a union, and does this arguably contrary to, and surely without authority to support this abrupt departure from established constitutional principles applicable to compelled association or non-association. The decision below should therefore be reviewed if it fails to adhere to prior decisions of this Court and, in any event, because it presents an important federal question that should be decided by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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* We acknowledge the assistance of Richard Betheil, a 1980 law school graduate not yet admitted to practice.

APPENDIX I

Appendix I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
79 Civ. 1372
July 13, 1979

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WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMONICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE, and GARY W. LUECK,

Plaintiffs,

-against-

FARRELL LINES, INC.; INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO; BROTHERHOOD OF MARINE OFFICERS, DISTRICT 1, MEBA, AFL-CIO; and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATION,

Defendants.

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SWEET, District Judge.

This action has presented an intricate tapestry of issues concerning contractual rights, legislative construction, and constitutional interpretation, all in the framework of labor law itself elabo-

rate and highly specialized. The defendants urge that these issues are beyond the reach of this court, principally because plaintiffs, who are supervisors, are outside the protections of the relevant statutory law and of the constitution. According to defendants, plaintiffs have extinguished their only rights, those grounded in contract, because those rights have been abrogated by arbitration. One strand in this tapestry, emphasized by plaintiffs, is that there is a constitutional right to associate which includes a right to be represented by a majority-selected union. While a district court might prefer to avoid these difficult issues, they have been squarely presented by highly skilled counsel for the parties. Because of this court's belief that "ordered liberty", (remarks, Chief Justice Burger, Law Day, May 1, 1979), A.B.A.

Journal, June 1979, at p. 932, is an essential ingredient of our complex society, the court is unwilling to declare that plaintiffs are without recourse to relief in their effort to assert organizational rights in a labor dispute. The court will therefore grant declaratory relief for the plaintiffs as set forth more fully below.

The Parties

Plaintiffs are ten licensed deck officers and engineers who are supervisory employees in the maritime shipping industry, members of defendant Brotherhood of Marine Officers, District 1, National Marine Engineers Beneficial Association, AFL-CIO ("BMO").[1/] They have all been employed for a substantial period of time aboard certain vessels formerly owned and operated by American export Lines, Inc. ("AEL") and since on

or about January, 1978, owned and operated by defendant Farrell Lines, Inc. ("Farrell"). "Farrell" is a New York corporation which owns and/or operates merchant cargo and bulk carriage vessels as a U.S.-flag ocean carrier; the defendant "BMO" is an affiliate of the National Marine Engineers' Beneficial Association, ("MEBA"); the defendant International Organization of Masters, Mates and Pilots, AFL-CIO ("MMP"), is an affiliate of the International Longshoreman's Association ("ILA"); and the defendant American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), is the national umbrella association of which MMP and BMO are members, which was served with a copy of the amended complaint but did not appear at trial, no relief having been sought against it.

The Claims and Prior Proceedings

Plaintiffs' claims, as broadly pleaded in their amended complaint resolved after the course of trial down to three basic assertions.[2/]

First, the plaintiffs allege that Farrell and MMP, by enforcing an arbitration award handed down in a proceeding between the ILA and MEBA, committed unfair labor practices as defined in the National Labor Relations Act, 29 U.S.C. §158. In their second claim, plaintiffs allege that BMO breached its statutory duty of fair representation under 29 U.S.C. §185 to the plaintiffs by the BMO's conduct following Farrell's purchase of the AEL ships including, inter alia, its failure to raise a constitutional claim at arbitration and to sue to prevent enforcement of the award. In their third

claim, the plaintiffs allege that Farrell's enforcement of the award is a violation of their First Amendment freedom of association in that it forces them to join a union not of their own choosing as a condition of their continued employment.

This action was originally brought on by a motion seeking a preliminary injunction pursuant to Rule 65, Fed.R.Civ. P. Plaintiffs at that time alleged, pursuant to Section 502 of the Employee Retirement Income Security Act of 1974, ("ERISA"), 29 U.S.C. §1132, that certain contract and pension rights were being denied them as a result of defendants' actions. This court, by Order dated March 16, 1979, issued an opinion denying that motion. After acquiring new counsel, plaintiffs filed an amended complaint and

again moved pursuant to Rule 65, Fed.R. Civ.P., for a preliminary injunction. In making the new motion plaintiffs alleged irreparable injury arising out of the violation of their statutory and constitutional rights. The original ERISA claim was then withdrawn, and the exhibits previously introduced at the first hearing were deemed to be received in evidence at the new hearing.

After evidentiary hearings on the latter application for preliminary relief, the court, exercising its discretion pursuant to Rule 65(a)(2), Fed.R. Civ.P., ordered that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing.[3/]

The Facts

The plaintiffs' claims challenge a

long standing industry practice dealing with the resolution by arbitration of inter-union jurisdictional disputes and arise out of the following facts.

Until January, 1978, Jensen and the other nine plaintiffs were employed as licensed deck officers on vessels owned or operated by AEL, a subsidiary of American Export Industries, Inc., ("AEI"), a New York shipping corporation. Pursuant to a reorganization plan resulting from proceedings under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701 et seq., AEL agreed to sell the 25 AEL owned or operated ships to Farrell. At all pertinent times prior to the sale, AEL and BMO had a valid collective bargaining agreement with a union shop provision under which the approximately 180 AEL supervisors working on AEL ships were

members of, and exclusively represented by, the BMO. Farrell, the purchaser in bankruptcy, owned or operated fourteen of its own ships immediately prior to the sale. At all times pertinent to this suit, Farrell has been a party to a multi-employer collective bargaining agreement with the MMP. That agreement provides that all licensed deck officers employed by Farrell shall be members of the union.

Shortly after Farrell purchased the AEL ships and integrated them into its normal operations, Farrell signed an agreement acknowledging the contract between the BMO and AEL. Afterwards, Farrell and BMO representatives negotiated a wage increase for the employees covered under the old contract which, in its prefatory language, acknowledged the validity of the BMO contract and Farrell's assumed

obligations respecting collective bargaining. Based upon its own contract with Farrell, however, the MMP, shortly after the sale in bankruptcy, asserted that it, not the BMO, was entitled to represent the men working on the newly acquired ships.

The MMP, by its parent, (ILA) submitted the dispute over representation rights to arbitration under Article XX of the AFL-CIO constitution.[4/] In the arbitration proceedings the parent organizations of BMO and MMP (MEBA and ILA, respectively) introduced extensive briefs, all of which were introduced in evidence at trial. Arbitrator Daniel Q. Mills found that the Farrell purchase constituted an accretion[5/] of the BMO/AEL fleet to the MMP/Farrell fleet and that, primarily because the MMP contract provided

for accretions whereas the BMO contract did not, the MMP contract[6] was to be given effect.

Following two internal AFL-CIO appeals pursuant to Article XX,[7] the arbitration award was finalized by the AFL-CIO executive committee on February 28, 1979, approximately a year after the initial arbitration began.[8] Farrell discontinued its pension, health, and vacation pay contributions under the BMO contract and began to make its contributions to the MMP plan.[9] Farrell also informed its BMO supervisors that they would have to join MMP as a condition of continued employment with Farrell.

Thus, if the plaintiffs and other BMO members had accepted the terms of the arbitration award they would, in effect, have been bound to a union shop agreement between MMP and Farrell and to the terms

of the MMP constitution.[10] They would thereby have been bound to accept the MMP as their exclusive representative. MMP offered the BMO members, including plaintiffs, membership in the union[11] on terms, inter alia, granting them the highest available seniority status of three grades accorded employees under MMP contract for jobs on former AEL ships.[12] Certain of the BMO members, obviously excluding the plaintiffs, accepted the MMP offer. However, because communication with the 21 ships was by cable, and because the ultimatum pursuant to the arbitration award (concerning joining the MMP) could be implemented only as the former AEL ships reached port, it was unclear at the time of trial exactly how many members of the BMO intended to join the MMP.[13]

On March 12, plaintiffs received

notice of the Farrell order when their ship, the CV Staghound, docked in Baltimore. On March 15, when their ship reached the port of New York, plaintiffs were informed of the effect of the arbitration award and of the requirement that they join the MMP as a prerequisite to continued employment with Farrell. Upon refusing to sign MMP membership cards, plaintiffs were forcibly removed from the Farrell ships by the New York City police. This action was filed shortly thereafter.

The First Claim

[1] Plaintiffs have articulated two versions of their first (unfair labor practice) claim. In the first version, plaintiffs assert that defendants committed an unfair labor practice under the literal terms of 29 U.S.C. §158. The obvious and fatal flaw of this first version is that plaintiffs are "supervi-

sors"[14/] under the definitional sections of the National Labor Relations Act (as amended)(NLRA) and, as supervisors, they are not statutory "employees" who are entitled to protection against statutory unfair labor practices.[15/] Plaintiffs have also ingeniously urged this court to add to the body of federal common law in the labor area by urging that the identical conduct which would support a finding (by the NLRB) of an unfair labor practice under 29 U.S.C. § 158 (if non-supervisory personnel were involved) constitutes by implication a breach of contract which plaintiffs assert, should be found to be actionable in a district court pursuant to 29 U.S.C. §185. In effect, then, plaintiffs seek to surmount the Congressionally mandated bar to a 29 U.S.C. §158 unfair labor practice claim face by non-employees such

as supervisory personnel by reading into it a contract claim based on 29 U.S.C. §185. The federal common law in this area commands no such result, and the plaintiffs' status as supervisory personnel deprives them of the right to assert an unfair labor practice claim in this court.

Jurisdiction and Standing

[2] Subject matter jurisdiction over the plaintiffs' second claim is properly in this court under 29 U.S.C. § 185[16/] even though supervisory personnel were excluded from the statutory definition of employees in the 1947 Taft-Hartley Act amendments to Section 2(3) of the Wagner Act, 29 U.S.C. §152(3).[17/] This conclusion derives primarily from the court's reading of cases which have analyzed the policies underlying the Act's supervisory exclusion, and which

lead the court to conclude that a claim based on 29 U.S.C. §185 is cognizable when plaintiffs are supervisory personnel. See generally District 2 Marine Engineers Beneficial Association v. Amoco Oil Co., 554 F.2d 774 (6th Cir. 1977); Globe Seaways, Inc. v. National Marine Engineers' Beneficial Association, 451 F.2d 1159, 1160 n.1 (2d Cir. 1971); United States v. National Marine Engineers' Beneficial Association, 294 F.2d 385, 392 (2d Cir. 1961); Isbrandtsen Co. v. District 2, Marine Engineers' Beneficial Association, 256 F.Supp. 68, 76-77 (E.D.N.Y.1966), (Zavatt, C.J.); Accord Dente v. International Organization of Masters, Mates and Pilots, Local 90, 492 F.2d 10, 12 (9th Cir.) cert. denied, 417 U.S. 910, 94 S. Ct. 2607, 41 L.Ed.2d 214 (1974).[18/]

[3] Furthermore, where subject matter jurisdiction is based on 29 U.S.C.

§185, as is the case with plaintiffs' second claim, the court's jurisdiction is also invoked under 28 U.S.C. §1337. See generally Avco Corp. v. Aero Lodge 735, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed2d 126, rehearing denied, 391 U.S. 929, 88 S.Ct. 1801, 20 L.Ed.2d 670 (1968): "Title 28 U.S.C. §1337 says that 'the district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . ..' It is that original jurisdiction that a §301 action invokes." Id., 390 U.S. at 561-62, 88 S.Ct. at 1238 (citation omitted).[19/]

[4] Subject matter jurisdiction over the third claim exists under 28 U.S.C. §1331.[20/] See Evans v. American Fed. of Television and Radio Artists, 354 F. Supp. 823, 837 (S.D.N.Y.1973), rev'd on other grounds, Buckley v. American Fed.

of Television and Radio Artists, 496 F.2d 305 (2d Cir. 1974), rehearing denied 420 U.S. 956, 95 S.Ct. 1342, 43 L.Ed.2d 433 (1975).[21] In Evans, as here, the analysis of subject matter jurisdiction under 28 U.S.C. §1331 was based on the reasoning that plaintiffs' rights ultimately depended upon an interpretation of the Constitution. See Id. at 837 and cases cited therein.

Because the constitutional claim raises the question of whether enforcement of the arbitration award would be an impermissible infringement of plaintiffs' First Amendment rights and therefore void as against public policy, subject matter jurisdiction over this claim is proper and a cause of action is stated.[22]

[5] Plaintiffs have standing to challenge the arbitration award under their second claim. See generally Santos

v. Dist. Council of New York City, 547 F.2d 197 (2d Cir. 1977) (suit brought by union members seeking enforcement of an Article XX arbitral award). In Santos the court rejected the contention that only unions, not individual union members, have standing to seek enforcement of an Article XX arbitration award. Id. at 200. Here, as in Santos, plaintiffs have not suffered "mere 'emotional disappointment'; they have lost their jobs . . .." Id. at 200. That they are not signatories to the relevant contracts does not deprive them of standing to sue for contractual enforcement under 29 U.S.C. §185. Id. at 200, n.3. Plaintiffs have sufficiently alleged that they have sustained injury from enforcement of the arbitration award and that they "'personally would benefit in a tangible way from the courts' intervention'." Santos at 199, quoting

from Warth v. Seldin, 422 U.S. 490, 508, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

[6] Plaintiffs have also sufficiently shown a definite injury and personal stake in the outcome of this litigation to maintain their constitutional claim, principally because the action arises out of events culminating in their loss of employment and forced removal from place of employment, allegedly for asserting the right they now seek to have vindicated.[23/] In the instant case, the forced removal of plaintiffs from the ships on which they served and their loss of employment was occasioned by their assertion of a First Amendment right and constitutes, therefore, the requisite objective harm.[24/] Cf. McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971) (loss of tenancy occasioned by assertion of First Amendment right). Furthermore, according

to the contract, the MMP, even if it does not represent a majority, is in a position to bind the plaintiffs to any agreement it might make. This threat of future harm is sufficiently "specific" in the First Amendment context to rise above the level of a mere "specific chill". See Carey, supra note 23.

The defendants have asserted that plaintiffs do not have standing, arguing that the MMP benefits equal or exceed those of the BMO, and that because plaintiffs had the opportunity to join MMP, no injury resulted. Initially, of course, this fails to meet plaintiffs' principal contention, viz, their loss of the right to be represented by a majority-selected union. In addition, however, the proof at trial established significant differences between the operation of the two collective bargaining agreements as to

vacation benefits, seniority, selection of billets, and overtime payments, among other benefits. The loss or modification of these rights constitutes an independent basis for standing.

The Second Claim

[7, 8] As stated above, plaintiffs urge this court to vacate the Article XX arbitration award on two grounds over which this Court has subject matter jurisdiction.[25/] In their second claim plaintiffs allege that the BMO breached its duty of fair representation, primarily by not raising certain legal issues at the Article XX proceeding and by recognizing the collective bargaining agreement between MMP and Farrell Lines rather than enforcing BMO's own contract with Farrell. It is well settled that in reviewing an arbitrator's award, "the court's function in confirming or vacating an arbitration

award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i. e., avoidance of litigation, would be frustrated." Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir.), cert. denied, 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960) (citation omitted). This is an outgrowth of the Supreme Court's endorsement, in the "Steelworker's Trilogy", of the notion that arbitration is the preferred method of settling disputes which arise from collective bargaining agreements. See United Steelworkers v. American Mfg. Co., 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed2d 1403 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358,

4 L.Ed.2d 1424 (1960). In light of these decisions a court will vacate an arbitrator's award only where it has been shown that the award was tainted with impropriety. In no circumstances will a court substitute its judgment for that of the arbitrator merely because the court disagrees with the arbitrator concerning the merits of the action. Timken v. Local 1123, United Steelworkers, 482 F.2d 1012, 1014 (6 Cir. 1973). As stated in Enterprise Wheel & Car Corp., supra:

> the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

363 U.S. at 599, 80 S.Ct. at 1362.

[9] It is equally well settled, however, that an arbitration award may be

vacated on the ground that there was fraud, partially or other misconduct on the part of the arbitrator, or that the award was based upon a manifest disregard of the law. See, e.g., Botany Industries, Inc. v. Amalgamated Clothing Workers of America, 375 F.Supp. 485, 490 n.6 (S.D. N.Y.1974), and cases cited therein. In addition, it is within the province of the court to overturn an award if the award is contrary to public policy, Local 453, Int'l Union of Electrical, Radio & Machine Workers v. Otis Elevator Company, 314 F.2d 25, 29 (2d Cir. 1963), or if a union has failed to provide the aggrieved employee(s) with fair representation in the course of the grievance or arbitration process. Vaca v. Sipes, 386 U.S. 171, 184-86, 87 S.Ct. 903, 17 L.Ed.2d 842; Suissa v. American Export Lines, Inc., 507 F.2d 1343, 1347 (2d Cir. 1974). Only

this last ground has been advanced here.

[10] The phrase "duty of fair representation" is a term of art which is incapable of precise definition. Griffen v. International U., U.A.W., 469 F.2d 181, 182 (4th Cir. 1972). Thus, in determining whether a union has breached its duty of fair representation, a court must examine the relevant facts of each case. Simberlund v. Long Island Railroad Company, 421 F.2d 1219, 1225 (2d Cir. 1970), and cases cited thereat.

[11] The "duty of fair representation" doctrine was first articulated in Steele v. Louisville & N. R. R., 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944), a case involving the Railway Labor Act. In Steele the Supreme Court indicated that a union has a statutory duty to represent fairly all members of the employee bargaining unit. Soon thereafter, the Court

extended this doctrine to cases arising under Section 301 of the NLRA, as amended, 29 U.S.C. §185. Ford Motor Company v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). In representing its employees, declared the court, a union is permitted "[a] wide range of reasonableness," but this latitude is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." Id. at 338, 73 S.Ct. at 686. The duty is premised on the theory that because the union is the exclusive bargaining representative of the employees, it has a statutory duty to represent fairly all employees in its collective bargaining with the employer and in its enforcement and administration of the resulting contract. Ford Motor Company, supra.

In Vaca v. Sipes, supra, the Court said: "A breach of the statutory duty of

fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." 386 U.S. at 190, 87 S.Ct. at 916. The Court went on to say that "[u]nder this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca, 386 U.S. at 177, 87 S.Ct. at 910, citing Humphrey v. Moore, 375 U.S. 335, 342, 84 S.Ct. 363, 11 L.Ed.2d 370 (1964).

[12] More recently, in Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed.2d 473, rehearing denied, 404 U.S. 874, 92 S.Ct. 24, 30

L.Ed.2d 120 (1971), the Court said: "[f]or such a claim [breach of duty of fair representation] to be made out, . . . [plaintiff] must have proved 'arbitrary or bad-faith conduct on the part of the Union,' Vaca v. Sipes, supra, [386 U.S.] at 193 [87 S.Ct. 903]. There must be substantial evidence of fraud, deceitful action or dishonest conduct." Id. at 299, 91 S.Ct. at 1924, citing Humphrey v. Moore, supra. See also Ryan v. New York Newspaper Printing, Inc., 590 F.2d 451, 455 (2d Cir. 1979). Based upon the authorities just referred to, this court has concluded that plaintiffs have not shown that BMO acted arbitrarily or in bad faith, and therefore, that, plaintiffs have not shown a failure on the part of BMO to represent them fairly at the arbitration proceeding.[26/] BMO's forceful and persistent representation of its

constituents in the Article XX proceeding and its conduct in the appeals from that proceeding can in no way be termed arbitrary conduct. At most, the BMO's failure to raise certain arguments might be said to amount to negligence, but proof that a union acted negligently or exercised poor judgment is not enough to make out a claim of unfair representation. Franklin v. Southern Pacific Transp. Co., 593 F.2d 899, 901 (9th Cir. 1979); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 293 (7th Cir. 1975); Bazarte v. United Transportation Union, 429 F.2d 868, 872 (3d Cir. 1970).[27/] Furthermore, this court finds that BMO's recognition and acceptance of the contract between MMP and Farrell did not amount to a breach of the duty of fair representation. That BMO adopted an agreement which particular employees did not favor does not amount

to hostile or discriminatory conduct and therefore does not constitute a breach of the duty of fair representation. The complete satisfaction of all who are represented by a union is hardly to be expected. See Simburland v. Long Island Railroad, supra, at 1227; Ford Motor Company v. Huffman, 345 U.S. at 338, 73 S. Ct. 681. As stated in Humphrey v. Moore, ". . . we are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another." 375 U.S. at 349, 84 S.Ct. at 371.

The Third Claim

[13] In their third claim plaintiffs seek injunctive relief against

Farrell's enforcement of the Article XX arbitration award on the ground that giving effect to the collective bargaining agreement between Farrell and MMP, including its exclusive representation provisions, would do violence to their First Amendment freedom of association. The argument thus presented challenges the maritime industry's practice of engaging in pre-hire collective bargaining contracts. Under this practice, a shipowner and a union enter into an exclusive representation agreement covering supervisory employees before any ships are actually built or any men are hired.[28/] Before it can reach the merits of this third claim, however, the court must first determine that governmental action is involved. See U.S. Const. Amend. I; Public Utilities Commission v. Pollack, 343 U.S. 451, 461-62, 72 S.Ct. 813, 96 L.Ed. 1068

(1952); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

State Action

[14] Whether the government has or has not acted in a given circumstance is not an easy determination.[29/] At least two primary strands of the government action doctrine can, however, be identified: the 'interdependence' or 'symbiotic relationship, view articulated in Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 and 725, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961), under which a court carefully "sift[s] facts and weigh[s] circumstances" and, the 'sufficiently close nexus with the challenged action' view articulated in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S.Ct. 449, 42 L.Ed.2d 477 (1974). In Jackson, the Supreme Court set forth a view of state action not wholly consistent with the Court's earlier

discussion in Burton. While apparently restricting Burton's scope, the Jackson Court did not, however, overrule Burton. Indeed, the Jackson Court's language indicates that at least something, of uncertain dimension survives of the "symbiotic relationship [test] presented in Burton . . .." Jackson, 419 U.S. at 357-58, 95 S.Ct. at 457. Thus, the Burton analysis of state action, as refined in Jackson, is still in force.

Under the Jackson analysis, a finding that Farrell's actions constitute governmental action would turn on whether there is a "sufficiently close nexus between the [government] and the challenged action of the [private] entity so that the action of the latter may be fairly treated as that of the [government] itself." Jackson, supra, at 351, 95 S.Ct. at 453 (citation omitted). See also

Graseck v. Mauceri, 582 F.2d 203, 209 (2d Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 91 (1979). In Jackson the Court held that the authorization and approval by the government of a private utility company's procedures did not transform the company's acts into governmental action. The Court indicated the government must "put its . . . weight" behind the challenged action to meet the test. 419 U.S. at 357, 95 S.Ct. 449. Prior to the Jackson decision, the Supreme Court had held that when governmental and private entities were so intertwined and their activities so interdependent that it could fairly be said that they were symbiotic, there was state action. Burton, supra.

In Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974, the Court of Appeals for the Second Circuit enunciated

five factors which are particularly important to a determination of whether private conduct will be considered governmental action:

> (1) the degree to which the "private" organization is dependent on governmental aid; (2) the extent and intrusiveness of the governmental regulatory scheme; (3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation; (4) the extent to which the organization serves a public function of acts as a surrogate for the State; (5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.
>
> Each of these factors is material; no one factor is conclusive.

Id. at 629.

[15, 16] These authorities, taken together, compel the court to conclude that the requisite state action exists, whether viewed in terms of "interdependence", "symbiosis", or "nexus". The

competing rights at issue are those among union members inter sese, and among union members and their employers—all in an industry where the government subsidy to the employer is based upon, or perhaps more accurately states results from the differential between the wages paid the union members and the wages paid to employees performing similar functions in foreign fleets. Exhibits which were received in evidence at trial indicate that Farrell received a cumulative sum exceeding $56 million in subsidies for operating costs, principally the cost of collective bargaining contracts.[30/] Other exhibits indicate that at the time of trial Farrell was receiving approximately $3.75 million to defray the expense of operating the Farrell fleet. The United States government also provides construction differential subsidies for the con-

struction of ships operated by Farrell,[31] and guarantees the payment of bonds and notes issued to provide financing for construction of such ships.[32] The routes for which subsidies are received must be approved by the government;[33] the United States also regulates extensively the manning and wage scales of officers and seamen serving aboard Farrell ships.[34] Indeed, the Merchant Marine Act of 1970 requires the existence of bona fide collective bargaining contracts before a fleetowner is eligible for the so-called Operating Differential Subsidy (ODS) and provides for Maritime Administration (MARAD) review of the fleetowners' collective bargaining costs. 46 U.S.C. §§ 1173(b), 1183[35] Furthermore, the legislative history of the Merchant Marine Act of 1970, the statute which permits the subsidies received by Farrell, establishes

that a primary purpose of the subsidies is to ensure a national maritime industry as an element in our national security.[36/] See 1970 U.S.Code Cong. & Admin.News, p. 4188.

In this court's view, the perceived need for this subsidization stems largely from our nation's high standard of living and enlightened industrial democracy. These factors in some measures account for the greater cost of operating U.S.-flag vessels as compared with operating foreign vessels. Indeed, the nexus between union rights and government subsidy is direct and demonstrable. Consequently, the court finds that there is governmental action. The reasoning of McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971), where action by a private landlord of a heavily-subsidized federal housing project was held to constitute state action,

applies here. In that case, the court reasoned that:

> at least when a specific governmental function is carried out by heavily subsidized private firms or individuals whose freedom of decision-making has, by contract and the reserved governmental power of continuing oversight, been circumscribed substantially more than that generally accorded an independent contractor, the coloration of state action fairly attaches.

438 F.2d at 784-85 (citations omitted).[37/]

In the context of the instant case Congress has recognized that the merchant marine carries out a specific governmental function of vital interest to the national defense.[38/] Farrell is a heavily subsidized private firm which has had its decision-making power greatly circumscribed by an extensive governmental regulatory scheme.[39/] It is subject to continuing oversight because in order to receive the subsidies on which its survival depends, Farrell must subject basic decision-making

regarding, inter alia, routes, cargo and working conditions, to Marad approval.[40/]

The Constitutional Rights of Plaintiffs

[17] It is conceded that Congress can deny supervisors the same right to organize that it grants to statutory employees.[41/] Therefore, there is no absolute right[42/] for supervisors to bargain collectively. Presented here, however, is the issue of whether once an employer agrees to bargain collectively with supervisors and sets the terms and conditions of employment, the supervisors have constitutional rights to exercise in that process. There is at least at the date of this writing, a First Amendment right in the context of collective bargaining to a determination that the union representing the members is, in fact, a majority-chosen union.

[18] It is, of course, settled that among the panoply of individual rights protected by the First Amendment is the freedom of association.[43/] NAACP v. Alabama, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). See also, Abood v. Detroit Board of Education, 431 U.S. 209, 233, 97 S.Ct. 1782, 52 L.Ed.2d 261, rehearing denied, 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977) (and cases cited thereat). Although less commonly conceived that freedom includes its converse, the freedom not to associate, the right not to be compelled to join a group of association against one's will. The right to associate and the right not to associate are complementary aspects of the broader freedom subsumed by the concept of liberty. Cf. Wooley v. Maynard, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L. Ed.2d 752 (1977) (freedom of speech in-

cludes freedom to refrain from speaking); Railway Employees Dept. v. Hanson, 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed. 1112 (1956) (by implication).[44/]

[19] The First Amendment's protection extends beyond its exercise for purely political purposes; it encompasses association in the economic context. See e. g. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945); NAACP v. Alabama, supra, 357 U.S. at 460-61, 78 S.Ct. 1163. It includes the protection of an individual's right to join with his fellows in a labor organization for the purpose of asserting mutual and collective economic interests. See N.L.R.B. v. Jones and Laughlin Steel, 301 U.S. 1, 32, 57 S. Ct. 615, 81 L.Ed 893, et seq. (1937). Where Congress had decided by statute that an overriding governmental interest exists in enhancing the security of unions, the

courts have held that such legislation, e. g. authorizing agency shops, is a permissible infringement of the associational rights. See e.g. Railway Employees' Dept. v. Hanson, supra; International Association of Machinists v. Street, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141 (1960). These holdings are based on the settled principle that First Amendment rights are not absolute. CSC v. Letter Carriers, 413 U.S. 548, 567, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); Abood v. Detroit Board of Education, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261, rehearing denied, 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977).[45/] In Abood, supra, Justice Powell said:

> "Neither the right to associate nor the right to participate in political activities is absolute . . . ." CSC v. Letter Carriers, 413 U.S. 548, 567 [93 S.Ct. 2880, 37 L.Ed2d 796] (1973) . . . Nevertheless, . . . a significant impairment of First

> Amendment rights must survive exacting scrutiny." Elrod v. Burns, supra, [427 U.S.] at 362 [96 S.Ct. 2673, 49 L.Ed.2d 547] (plurality opinion); accord, id., at 381 [96 S.Ct. 2673] (POWELL, J. dissenting). "The [governmental] interest advanced must be paramount one of vital importance, and the burden is on the government to show the existence of such an interest. . . . [C]are must be taken not to confuse the interest of partisan organizations with governmental interests. Only the latter will suffice. Moreover, . . . the Government must 'emplo[y] means closely drawn to avoid unnecessary abridgment . . ..' Buckley v. Valeo, supra, [424 U.S.] at 25 [96 S.Ct. 612]." Id., [427 U.S.] at 362-363 [96 S.Ct. 2673] (plurality opinion).
> 431 U.S. at 259, 97 S.Ct. at 1812 (Powell, J., concurring in the Judgment).

Thus, the required balancing is between the seriousness of the restriction on plaintiffs' rights and the governmental interest in leaving the challenged practice intact. On balance, the effect of the defendants' actions here is to impose a union shop agreement on the plaintiffs as a condition of their con-

tinued employment. Absent the safeguard of majority representation, the practice is overly and unnecessarily restrictive. In other contexts courts have held that statutorily authorized union security agreements, in conjunction with the statutory requirement[47/] that a majority of the affected employees designate their chosen representative, are permissible infringements of the First Amendment right to associate. See generally, Railway Employees' Dept. v. Hanson, ("Hanson"), 351 U.S. 225, 76 S.Ct. 714, 100 L.Ed 1112 (1956), Frankfurter, J. concurring. The Supreme Court in Hanson, supra, upheld the constitutionality of Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. §152, on the ground that the choice of a union shop in furtherance of the goal of labor peace was a permitted exercise of Congressional power under the

Commerce Clause, U.S.Const. Article I, Section 8. Hanson, 351 U.S. at 233-35, 76 S.Ct. 714. Remarked the Hanson court,

> Congress has authority to adopt all appropriate measures to "facilitate the amicable settlement of disputes which threaten the service of the necessary agencies of interstate transportation." Texas & N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 570 [50 S.Ct. 427, 74 L.Ed. 1034]. These measures include provisions that will encourage the settlement of disputes "by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them" (Virginian R. Co. v. Federation, 300 U.S. 515, 548 [57 S.Ct. 592, 81 L.Ed. 789]) and that will protect the employees against discrimination or coercion which would interfere with the free exercise of their right to self-organization and representation. Labor Board v. Jones & Laughlin, 301 U.S. 1, 33 [57 S.Ct. 615, 81 L.Ed. 893].

351 U.S. at 233, 76 S.Ct. at 718-719.

The various statutorily authorized union security provisions,[48/] have been held constitutional by this reasoning. See e. g., Abood v. Detroit Board of Edu-

cation, 431 U.S. 209, 225, 97 S.Ct. 1782, 52 L.Ed.2d 261, rehearing denied, 433 U.S. 915, 97 S.Ct. 2989, 53 L.Ed.2d 1102 (1977). In Abood, which held, inter alia, that an agency shop agreement is valid when the members' dues are used for collective bargaining expenses but that individual union members may not be compelled to make expenditures for political purposes with which they do not agree, the court said:

> The designation of a union as exclusive representative carries with it great responsibilities . . . Moreover, in carrying out these duties, the union is obliged "fairly and equitably to represent all employees . . ., union and non-union," within the relevant unit. A union-shop arrangement has been thought to distribute fairly the cost of these activities among those who benefit, and it counteracts the incentive that employees might otherwise have to become "free riders" — to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees.

To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. An employee may very well have ideological objections to a wide variety of activities undertaken by the union in its role as exclusive representative. His moral or religious views about the desirability of abortion may not square with the union's policy in negotiating a medical benefits plan. One individual might disagree with a union policy of negotiating limits on the right to strike, believing that to be the road to serfdom for the working class, while another might have economic or political objections to unionism itself. An employee might object to the union's wage policy because it violates guidelines designed to limit inflation, or might object to the union's seeking a clause in the collective bargaining agreement proscribing racial discrimination. The examples could be multiplied. To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit. But the judgment clearly made in Hanson and Street is that such interference as exists is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations

established by Congress.

Id. at 221-22, 97 S.Ct. at 1792-1793 (citations and footnotes omitted).[49/]

[20] It does not follow that because an employer is under no complulsion to accord his supervisors the "anomalous status of employees,"[50/] and thus may fire them if they join a union, that supervisory employees have no rights to select their representative by majority vote when and if the employer elects to and does recognize a union of supervisors. Here, the defendants argue that Hanna Mining Co. v. District 2, Marine Engineers Beneficial Ass'n., AFL-CIO, 382 U.S. 181, 86 S.Ct. 327, 15 L.Ed.2d 254 (1965) and Beasley v. Food Fair of North Carolina, Inc., 416 U.S. 653, 94 S.Ct. 2023, 40 L.ED.2d 443 (1973), mandate a holding that BMO licensed deck officers, no

matter by how much they outnumber their MMP counterparts, must either accept MMP or lose their jobs being devoid of any protection under the Act. The Hanna Court dealt with a union's efforts to unionize supervisors, and held, inter alia, that "activity designed to secure organization or recognition of supervisors cannot be protected by §7 of the Act" 382 U.S. at 188, 86 S.Ct. at 331. In Beasley the Court held that supervisors, who are not protected by the Act, cannot be awarded damages for discharge by their employer. Neither case is based upon either an alleged constitutional right or the concept of majority representation. Moreover, unlike the instant case, the employers involved in Hanna and Beasley had not recognized the relevant union nor bargained with it. Therefore, these cases do not bar a holding that under the First

Amendment plaintiffs are at least entitled to have their representative chosen by a majority vote, irrespective of whether they may be required to join a union as a condition of employment. The majority representation principle as it is reflected in statutes[51/] and case law[52/] constitutes a fundamental right in the labor relations context.

Relief

As indicated above, plaintiffs have been determined to be entitled to a declaration that representation by a union, not majority selected, constitutes a violation of their First Amendment rights. However, the protection of those rights should not result in the immediate disruption of the relationship between Farrell and MMP.

The relief here granted to enforce plaintiffs' constitutional rights will be

analogized to the relevant practice which is followed with respect to statutory employes who are "covered" by the NLRA.

Plaintiffs represented in open court that an election might not be the only way to determine which union has majority status. If the parties are able to agree on a process, such as union card authorization, which would establish the majority status of the unions involved, such process would be satisfactory to this court, for as the Supreme Court has indicated in NLRB v. Gissel Packing Co., 395 U.S. 575, 597, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), quoting from United Mine Workers v. Arkansas Flooring Co.,351 U.S. 62, 76 S. Ct. 559, 100 L.Ed. 941 (1956) when the NLRA applies,

> "Board election is not the only method by which an employer may satisfy itself as to the union's majority status," 351 U.S., at 72, n.8, [76 S.Ct. 559], since

> §9(a), "which deals expressly with employee representation, says nothing as to how the employees' representative shall be chosen," 351 U.S., at 71, [76 S.Ct. 559.]

395 U.S. at 597, 89 S.Ct. at 1931.[53/]

In the event that the parties fail to agree on such a process, the statutory rules and National Labor Relations Board regulations relating to decertification proceedings will constitute a vade mecum for the court.[54/] This declaration should therefore not serve to dislodge the present status quo or to alter the existing contractual terms and conditions of employment. If it is subsequently determined that MMP is not supported by the majority of the personnel in the relevant fleetwide unit, then, and only then, will it be determined that plaintiffs' constitutional rights, here declared, have been violated.

The plaintiffs are directed to sub-

mit a judgment consistent with this opinion, on notice, to the clerk of this court within 14 days hereof.

IT IS SO ORDERED.

Footnotes

1/The individual plaintiffs are as follows:

Plaintiff WILLIAM JENSEN is a citizen of the United States and a resident of the State of New Jersey and has been employed aboard vessels owned and operated by AEL and Farrell since 1951. He was Captain of the "Export Courier" prior to the events culminating in this action.

Plaintiff EDWIN KREMER is a citizen of the United States and a resident of the State of Pennsylvania and has been employed aboard vessels operated by AEL and Farrell since 1960. He held a Master's license and was Chief Officer on the containership "Export Freedom" prior to the events culminating in this action.

Plaintiff JOHN GARDELLA is a citizen of the United States and a resident of the State of Pennsylvania and has been employed aboard vessels operated by AEL and Farrell since 1946. Prior to the events culminating in this action he was the Chief Engineer on the containership "Admiral Callaghan."

Plaintiff WILLIAM KUYL is a citizen of the United States and a resident of the State of New Jersey and has been employed aboard vessels operated by AEL and Farrell since 1963. He holds a Master's license and prior to the events culminating in this action was employed as Second Mate on the containership "Staghound."

Plaintiff ANTHONY LORE is a citizen of the United States and a resident of the State of New York and has been employed

on vessels operated by AEL and Farrell since 1947. He was registered and scheduled for employment as a licensed Deck Officer on the containership "Staghound" as of March 15, 1979, but was subsequently denied such employment allegedly for reasons which gave rise to this action.

Plaintiff GARY W. LUECK is a citizen of the United States and a resident of the State of New York and has been employed on vessels operated by AEL and Farrell since 1973. He was registered and scheduled for employment as a licensed Deck Officer on the containership "Staghound" as of March 15, 1979 but was subsequently denied such employment allegedly for the reasons which gave rise to this action.

Plaintiff DOMINICK BISBANO is a citizen of the United States and a resident of the State of Rhode Island and has been employed on vessels operated by AEL and Farrell since 1965. He holds a Chief Engineer's license and prior to the events culminating in this action was First Engineer on the containership "Export Patriot."

Plaintiff LINDSAY HOYT is a citizen of the United States and a resident of the State of New York and has been employed on vessels operated by AEL and Farrell since 1969. He was registered and scheduled for employment as a licensed Deck Officer on the containership "Staghound" as of March 15, 1979, but was denied such employment allegedly for reasons which gave rise to this action.

Plaintiff FRANCIS S. HAGGERTY is a citizen of the United States and a resident

of the State of Maryland and has been employed on vessels operated by AEL and Farrell since 1963. He was registered and scheduled for employment as a licensed Deck Officer on the containership "Staghound" as of March 15, 1979, but was denied such employment allegedly for reasons which gave rise to this action. Plaintiff RICHARD TRIPPE is a citizen of the United States and a resident of the State of Connecticut and has been employed on vessels operated by AEL and Farrell since 1965. He was registered and scheduled for employment as a licensed Deck Officer on the containership "Staghound" as of March 15, 1979, but was denied such employment allegedly for reasons which gave rise to this action.

2/Plaintiffs also pleaded several other claims which were not significantly developed or contested at trial and which upon consideration by the court, have been determined to be of no consequence to the resolution of this dispute, primarily because they are subsumed under the claims which were vigorously contested by the parties. Those subsidiary claims include: a claim arising out of the plaintiffs' forced removal from Farrell's ships alleging that Farrell and MMP conspired in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1985, to violate plaintiffs' freedom of association, other civil rights, and rights secured to them under the privileges and immunities clause of the Constitution, U.S.Const. Article IV, sec. 2; and a claim against each individual defendant on the same statutory ground

arising out of the enforcement of the arbitration award alleging that the forced removal of the BMO men from Farrell's ships constituted a violation of their right to employment free from discrimination. See generally Local No. 1 (ACA), Broadcast Employees of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 419 F.Supp. 263, 274-77 (E.D.Pa. 1976) (discussion of civil rights statutes in the labor relations context).

Plaintiffs also filed a claim under the Fifth Amendment alleging deprivation of a property right without due process of law, U.S.Const. Amend. V; and a claim under the Jones Act, 46 U.S.C. §§ 591 et seq. for wages and wrongful discharge.

3/Defendant MMP objected to the Fed. R.Civ.P. 65 consolidation. Mindful that notice to the parties of consolidation is a prerequisite under Rule 65(a)(2), Fed.R.Civ.P., see generally Acha v. Beame, 531 F.2d 648, 651 (2d Cir. 1976), the Court's reference to consolidation was made at the outset of the hearings and all the parties conducted the litigation as a full-blown trial on the merits. There was ample opportunity for each to present all his evidence. See generally Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973); 7 J Moore, Federal Practice ¶65.04[4]. Although MMP asserted that discovery would have provided an opportunity to develop more evidence relating to its contentions, no

offered proof regarding specific areas of evidence which would have been relevant to the issues here discussed was made. This is especially so in light of the extensiveness of the evidence presented and the lack of surprise. See Eli Lilly & Co. v. Generix Drug Sales, Inc., 460 F. 2d 1096, 1105 (5th Cir. 1972) (cited with approval in Galella v. Onassis, supra, 487 F.2d at 998). See also City of Rye v. Shuler, 355 F.Supp. 17, 19-20 (S.D.N. Y. 1973).

4/Quoted below are the most relevant sections of Article XX of the AFL-CIO constitution:

> Sec. 2. Each affiliate shall respect the established collective bargaining relationship of every other affiliate. No affiliate shall organize or attempt to represent employees as to whom an established collective bargaining relationship exists with any other affiliate. For purposes of this Article, the term, "established collective bargaining relationship" means any situation in which an affiliate, or any local or other subordinate body thereof, has either (a) been recognized by the employer (including any governmental agency) as the collective bargaining representative for the employees involved for a period of one year or more, or (b) been certified by the National Labor Relations Board or other federal or state agency as the collective bargaining representative for the employees.
>
> Sec. 10. The Impartial Umpire shall

make a determination, after hearing, based upon the principles set forth in this Article. He shall make such determination within a time specified by the President unless an extension of time is agreed to by the parties. The President shall transmit copies of the determination to all affiliates involved. He shall, at the same time, request any affiliate which the Impartial Umpire has found to be in violation of this Article to inform him as to what steps it intends to take to comply with such determination. Any response received, or the fact that no response has been received within a time fixed by the President, shall be communicated to the other parties to the dispute.

Sec. 13. The subcommittee of the Executive Council may disallow the appeal, in which event the determination of the Umpire shall be final, and subject to no further appeal and shall go into full force and effect; or the subcommittee may refer the appeal to the Executive Council, in which event the determination of the Umpire shall be automatically stayed pending disposition of the appeal by the Executive Council. The determination of the Umpire shall be sustained unless it is set aside or altered by a vote of a majority of all of the members of the Executive Council. The decision of the Executive Council where an appeal is granted shall be final, and shall be effec-

> tive as of the date therein specified.
>
> Sec. 20. The provisions of this Article with respect to the settlement and determination of disputes of the nature described in this Article shall constitute the sole and exclusive method for settlement and determination of such dispute and the provisions of this Article with respect to the enforcement of such settlements and determinations shall constitute the sole and exclusive method for such enforcement. No affiliate shall resort to court or other legal proceedings to settle or determine any disputes of the nature described in this Article or to enforce any settlement or determination reached hereunder.

5/In reaching that decision, arbitrator Mills rejected the following contention asserted by BMO's parent, MEBA: Farrell's purchase should be considered a merger of the two fleets because a greater number of ships, and consequently a larger number of licensed deck officer positions, was being added to the smaller, existing Farrell fleet.

6/The pertinent coverage provisions in the MMP collective bargaining agreement provide the following:

> The Company recognizes the Organization as the sole representative for collective bargaining of its Licensed Deck Officers (except where specifically otherwise provided, the term, "Licensed Deck Officers" whenever

and wherever used in this Agreement, includes the Master) on U.S.-Flag oceangoing vessels.

The parties agree that it shall be the essence of the Agreement that its administration shall be confined exclusively to the parties.

The Company will not engage in activities or assist or encourage Licensed Deck Officers, or others who are not members of the Organization, in activities calculated to undermine the status of the Organization as the sole collective bargaining representative. The Company will not attempt to influence or persuade any member of the Organization to withdraw therefrom nor will the Company, in any way, attempt to interfere with the internal affairs of the Organization.

All Employees who are presently members in good standing of the Organization, or any future members, shall be required to remain members in good standing during the life of this Agreement in order to continue their present employment or to be eligible for future employment subject to all other provisions of this Agreement, provided that the Company shall not be required to take action until first notifed by the Organization, that such Employee has lost his good standing. The term "good standing" for purposes of Section II means the Employee or prospective Employee shall be paid up in all dues, service fees and assessments. [Section II, 1]

> This Agreement covers the Licensed Deck Officers employed on oceangoing U.S.-flag vessels, owned, operated or bareboat chartered (both at present or at any time during the life of this Agreement) by the Company or any of its subsidiaries or affiliates (whether so at present or at any time during the life of this Agreement) as an owner, agent, operator or bareboat charterer. [Section V, 1(a)] In the event a tanker Company acquires a vessel other than a tanker vessel, or a dry-cargo Company acquires a tank vessel, such vessel will be covered under an Agreement similar to that between the Organization and Companies with similar type vessels. [Section V, 1(e)]

7/See footnote 4, supra.

8/The determination of the Impartial Umpire is dated July 31, 1978, and was received in evidence here.

9/Under the MMP group contract, fleet owner employers are required to make vacation salary payments to a union-run plan. Upon coming ashore, individual employees receive their accrued vacation pay from the plan, provided they are members in good standing and all their dues are paid. The vacation pay application form authorizes MMP plan trustees to deduct dues payments that are in arrears before sending out vacation pay. Under the BMO contract, licensed deck officers are entitled to re-

ceive their accrued vacation pay directly from the employers. Although the MMP system is not a technically-exact dues "checkoff", see Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, it effectively operates as one.

10/Sections 2(a) and 2(b) of the MMP Constitution provide:

> Every member by virtue of his membership in the Organization is obligated to adhere to and follow the terms of the International Constitution and any applicable By-Laws, Work Rules or any directives promulgated thereunder and shall enjoy the rights, duties, privileges and immunities conferred by them and by statute. Each member shall faithfully carry out such duties and obligations and shall not interfere with the rights of fellow members.
>
> Every member by virtue of his membership in the Organization authorizes it to act as his exclusive bargaining representative with full and exclusive power to execute Agreements with his employer governing terms and conditions of employment and to act for him and have final authority in presenting, processing and adjusting any grievance, difficulty or dispute arising under any Collective Bargaining Agreement or out of his employment with such employer, in such manner as the Organization or its Officers deem to be in the best interest of the Organization and the membership as a whole.

Section 5(f) of the Constitution of the MMP provides:

> No member of the Organization may be a member of another maritime trade union or work under a Collective Bargaining Agreement of another maritime trade union without the express written permission of the International Subcommittee. If written permission is granted under this subsection, it shall only be valid for a period of six (6) months at which time the member must reapply. If a member violates this provision, he shall be immediately suspended and shall not be entitled to any of the benefits and privileges of the Organization or its Collective Bargaining Agreements.

Section II, ¶ 1 of the MMP contract provides:

> "The Company recognizes the Organization as the sole representative for collective bargaining of its Licensed Deck Officers (except where specifically otherwise provided, the term, "Licensed Deck Officers" whenever and wherever used in this Agreement, includes the Master on U.S.-Flag oceangoing vessels.
>
> The parties agree that it shall be the essence of the Agreement that its administration shall be confined exclusively to the parties.
>
> The Company will not engage in activities or assist or encourage Licensed Deck Officers, or others who are not members of the Organization, in activities calculated to undermine the status of the Organ-

ization as the sole collective bargaining representative. The Company will not attempt to influence or persuade any member of the Organization to withdraw therefrom nor will the Company, in any way, attempt to interfere with the internal affairs of the Organization.

All Employees who are presently members in good standing of the Organization, or any future members shall be required to remain members in good standing during the life of this Agreement in order to continue their present employment or to be eligible for future employment subject to all other provisions of this Agreement, provided that the Company shall not be required to take action until first notified by the Organization, that such Employee has lost his good standing. The term "good standing" for purposes of Section II means the Employee or prospective Employee shall be paid up in all dues, service fees and assessments."

Section V, ¶¶ 1(a)(b)(e) provide:

This Agreement covers the Licensed Deck Officers employed on oceangoing U.S. flag vessels, owned, operated or bareboat chartered (both at present or at any time during the life of this Agreement) by the Company or any of its subsidiaries or affiliates (whether so at present or at any time during the life of this Agreement) as an owner, agent, operator or bareboat charterer.

> The term "subsidiary" or "affiliate" shall be deemed to include any business entity whether corporate, partnership, trust, individual or otherwise, which is effectively controlled by or effectively controls the Company either directly or indirectly. In the event a tanker Company acquires a vessel other than a tanker vessel, or a dry-cargo Company acquires a tank vessel, such vessel will be covered under an Agreement similar to that between the Organization and Companies with similar type vessels.

11/By the MMP offer, which was addressed to licensed deck officers on former AEL ships, and dated March 19, 1979, the BMO members were told:

> In addition to those officers already holding Class "A" Group status by virtue of their MMP membership who are also BMO members, all former American Export Line Deck Officers accepted into membership will be afforded equal Class "A" Group status by virtue of their MMP membership who are also BMO members, all former American Export Line Deck Officers accepted into membership will be afforded equal Class "A" job rights on board the former AEL vessels. Such Officers being accepted into MM&P membership will also receive a free MM&P book giving them Class "C" shipping rights on all other MM&P contract vessels.
>
> With the addition of the former AEL ships, the MM&P Offshore contract

fleet numbers almost 400 ocean-going vessels. You will have the right to ship out on these ships from any one of the 20 Port offices located throughout the continental United States, Puerto Rico, and Hawaii, in accordance with our contract and Shipping Rules.

You have been working under the MM&P Offshore contract since March 5th and Farrell Lines has been making contributions on your behalf to the MM&P's non-contributory Pension Plan, the MM&P Health and Benefit Plan, the MM&P Vacation Plan, the MM&P M.A.T.E.S. Program and the various other plans and committees required by the contract since that date. On signing foreign articles for a voyage of 30 days or over, you and your dependents will be fully covered by our Health and Benefit Plan which is widely acknowledged to have one of the most extensive hospital, surgical and medical programs available anywhere in the world. Under the contract, the plaintiffs could keep their membership in BMO renewable for six months (see footnote 10, supra) if they received written permission. Otherwise they would have to resign or lose their jobs.

12/Extensive evidence was introduced at trial on the issue of differences between the two contracts with respect to wages, benefits and working conditions, including which provides greater security to chief officers, second mates and

and third mates. But contract damages are not of consequence to the injunctive relief issue here.

13/Farrell represented in open court that it did not care which union it bargained with, so long as there was only one representative to be dealt with.

14/No party has consented the conclusion that licensed deck officers are supervisory personnel under the relevant sections of the Act. See, e.g. plaintiff's undated memorandum of law at 10, footnote, citing Globe Seaways, Inc. v. National Marine Eng. Ben. Ass'n, 451 F.2d 1159, 1160 n.1 (2d Cir. 1973). For a fuller discussion of the relevant sections of the Act in this regard, see the text of this opinion, infra, and see footnote 15 hereof.

15/The Labor Management Relations (Taft-Hartley) Act § 101, 29 U.S.C. §152(3) (1970), amended the Wagner Act's definition of protected employees to exclude "any individual employed as a supervisor." Section 101 of the Act, 29 U.S.C. § 152(11)(1970), further defined a "supervisor" as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of

independent judgment."

The full text of the definition of "employee" in 29 U.S.C. § 152(3) is as follows:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

(emphasis supplied). As indicated in footnote 14 of this opinion, the plaintiffs in this action are supervisory personnel. For background discussion of the exclusion of supervisory personnel from the definition of "employees" under the NLRA, see N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 275, 94

S.Ct. 1757, 40 L.Ed.2d 134, et seq. (1973); N.L.R.B. v. Yeshiva University, 582 F.2d 686, 695 (2d Cir. 1978), cert. granted, 440 U.S. 906, 99 S.Ct. 1212, 59 L.Ed.2d 453 (1979); International Ladies Garment Workers Union v. N.L.R.B., 339 F.2d 116, 121, et seq. (2d Cir. 1964). See also Note, 13 Ga.L.Rev. 313 (Fall 1978), R. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining (1976) at 33, et seq. See also footnote 18 of this opinion.

If the plaintiffs were not supervisory employees, the action by Farrell could have been found to amount to an unfair labor practice. See Garment Workers v. Labor Board, 366 U.S. 731, 81 S.Ct. 1603, 6 L.Ed.2d 762 (1961), wherein the Court remarked:

> In their selection of a bargaining representative, § 9(a) of the Wagner Act guarantees employees freedom of choice and majority rule. J. I. Case Co. v. Labor Board, 321 U.S. 332, 339 [64 S.Ct. 576, 88 L.Ed. 762.] In short, as we said in Brooks v. Labor Board, 348 U.S. 96, 103 [75 S.Ct. 176, 99 L.Ed. 125,] the Act placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." Here, however, the reverse has been shown to be the case. Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could

> be no clearer abridgement of § 7 of the Act, assuring employees the right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity. It follows, without need of further demonstration, that the employer activity found present here violated § 8(a)(1) of the Act which prohibits employer interference with, and restraint of, employee exercise of § 7 rights.

Id. at 737, 81 S.Ct. at 1607 (footnote omitted). Under statutory provisions of the labor laws authorizing exclusive bargaining status, the plaintiffs, if covered, would have an opportunity to petition for decertification.

16/Section 185 of Title 29 of the United States Code, providing for suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce, is both jurisdictional and substantive in its effect. See Textile Workers v. Lincoln Mills, 353 U.S. 448, 449-50, 77 S.Ct. 923, 1 L.Ed.2d 972 (1957); Leonardis v. Local 282, Pension Trust Fund, 391 F.Supp. 554, 556 (S.D.N.Y. 1975).

17/See footnotes 14 and 15.

18/This court has jurisdiction over the second claim even though supervisory unions may not be entitled to sue as labor organizations in other contexts. See generally Hanna Mining Co. v. Dist.

2 Marine Engineers Beneficial Association, 382 U.S. 181, 189-90, 86 S.Ct. 327, 15 L.Ed.2d 254 (1965). The debate over subject matter jurisdiction under 29 U.S.C. § 185 has focused on the meaning of the term "employee" for the purposes of its application with respect to labor organizations "representing employees." The Court of Appeals for the Second Circuit, in the cases cited in the text accompanying this footnote has adopted the position that the Taft-Hartley amendment to the National Labor Relations Act adopting the exclusion was meant only to apply to statutory "employees" under those sections of the Act dealing with unfair labor practices and other matters within the primary jurisdiction of the National Labor Relations Board. Following that view, this court finds that the plaintiffs, regardless of their supervisory status, are entitled to assert their second claim under 29 U.S.C. § 185 as members of labor organizations.

19/For an overview of the different theories upon which courts have based their conclusions that they have jurisdiction to enforce the duty of fair representation, see R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining (1976) at Chapter 30, § 3.

20/The requirements for finding jurisdiction under the cited statute are set forth in PAAC v. Rizzo, 502 F.2d 306, 312 (3d Cir. 1974), cert. denied, 419 U.S. 1108, 95 S.Ct. 780, 42 L.Ed.2d

804 (1975). See also Duke Power Co. v. Carolina Environ. Study, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978); T. B. Harms Co. v. Eliscu, 339 F.2d 823, 827 (2d Cir. 1964), cert. denied, 381 U.S. 915, 85 S.Ct. 1534, 14 L.Ed.2d 435 (1965); Rosenthal & Rosenthal, Inc. v. Aetna Casualty & Surety Co., 259 F.Supp. 624, 627 (S.D.N.Y. 1966). With respect to jurisdictional amount question, see Committee for GI Rights v. Callaway, 171 U.S.App.D.C. 73, 80 n.19, 518 F.2d 466, 473 n.19 (D.C.Cir. 1975); Hartigh v. Latin, 158 U.S.App.D.C. 289, 293, 485 F.2d 1068, 1072 (D.C.Cir. 1973), cert. denied sub nom. Dist. of Columbia v. Marsh, 415 U.S. 948, 94 S.Ct. 1470, 39 L.Ed.2d 564 (1974); S.Rep.No. 1830, 85th Cong., 2d Sess. 3 (1958).

21/In Buckley, supra, the Court of Appeals for the Second Circuit "conclude[d], without having to decide the issue of whether AFTRA's dues requirement is 'government action', that the district court had jurisdiction to adjudicate the appellees' claims that AFTRA's dues requirement impinges upon appellees' first amendment rights." 496 F.2d at 310.

22/In Holodnak v. Avco Corp., 381 F. Supp. 191 (D.Conn. 1974), modified, 514 F.2d 285 (2d Cir.), cert. denied, 423 U.S. 892, 96 S.Ct. 188, 46 L.Ed.2d 123 (1975), the Honorable J. Edward Lumbard, sitting by designation, asserted that he did not decide whether the rationale of Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619

(1971), extends to actions charging violations of the First Amendment, 381 F. Supp. at 204, n.12. On appeal, the Court of Appeals for the Second Circuit indicated its belief that, notwithstanding his disclaimers, Judge Lumbard did decide in the affirmative that Bivens applies to actions under the First Amendment, 514 F.2d 285, 292 (2d Cir. 1975). The Second Circuit itself, however, found it unnecessary to decide the question, and has still not expressed a view on the issue. Other Circuit Courts have, however, held that there is a private cause of action for damages directly under the Constitution for violation of First Amendment Rights. See e.g., Dellums v. Powell, 184 U.S.App.D.C. 275, 302, 566 F.2d 167, 194 (D.C.Cir. 1977), cert. denied, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975), cert. denied 439 U.S. 983, 99 S.Ct. 573, 58 L.Ed.2d 654 (1979); Paton v. La Prade, 524 F.2d 862, 869-70 (3d Cir. 1975); Writers Guild of America, West, Inc. v. F.C.C., 423 F.Supp. 1064, 1088-89 (C.D.Calif. 1976). Because of the declaratory nature of the relief awarded here, this court need not decide whether a private party may recover monetary damages for a violation of his First Amendment Rights.

23/In Duke Power Co. v. Carolina Environ Study, supra, the Supreme Court summed up the requirements for a finding of constitutional standing. See also St. Martins Press, Inc. v. Carey, 605 F.

2d 41 (2d Cir. 1979). As indicated in the text accompanying this footnote the court has found that these requirements have been met in the instant case.

24/Plaintiffs are in the position to challenge the constitutionality of maritime industry practice in this case because Farrell assumed the employer's obligations under the AEL-BMO contract following Farrell's purchase of the 21 AEL ships. Normally, under pre-hire contracts there would be a majority union representative because no deck officer would be hired until he at least became an applicant for membership in the union. The circumstances of this case are peculiar because Farrell entered into a contract with the BMO even though it could have released the BMO deck officers on the ground that bankruptcy terminated the AEL-BMO contract. Had Farrell done so, it would have been within its rights under International Organization of Masters, Mates and Pilots, AFL-CIO v. National Labor Relations Board, ("Cove Tankers Corporation"), 188 U.S.App.D.C. 15, 21, 575 F.2d 896, 902 (D.C.Cir.1978) and Internationl Organization of Masters, Mates and Pilots, AFL-CIO v. National Labor Relations Board, ("Westchester Marine Shipping Co."), 539 F.2d 554 (5th Cir. 1976), cert. denied 434 U.S. 828, 98 S.Ct. 106, 54 L.Ed.2d 86 (1977) which impliedly upheld the practice and effect of replacing members of one union with members of another union upon the transfer of ownership of the ships. See generally National Labor Relations Board v. National Maritime Union of America, AFL-CIO, 486 F.2d 907, 913-914 (2d Cir. 1973) cert. denied, 416 U.S. 970

94 S.Ct. 1993, 40 L.Ed.2d 559 (1974); Moore McCormack Lines, Inc., 139 NLRB 796, 798-99 (1962). However, by recognizing BMO, ostensibly for the purpose of preserving labor peace, Farrell precipitated the Article XX proceeding which resulted in the arbitration award challenged in this action.

25/The conclusion that this court has subject matter jurisdiction over plaintiffs' second and third claims is unaffected by the procedural posture of the action as a challenge to an Article XX arbitration award. See Kallen v. District 1199, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, 574 F.2d 723, 725 (2d Cir. 1978).

26/It is unclear whether fraud, deceitful action, or dishonest conduct on a part of defendant union is necessary to make out a claim of breach of the duty of fair representation. See Ryan v. New York Newspaper Printing, Inc., 590 F.2d 451, 455 and 456 (2d Cir. 1979), in conjunction with Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798 (2d Cir. 1974). This court need not resolve that issue here because even absent fraud, deceitful conduct action or dishonest conduct, BMO did not act arbitrarily or otherwise in bad faith.

27/The court expresses no opinion concerning whether the conduct of BMO may have amounted to negligence because, as indicated in the text accompanying this note, negligent conduct alone would not suffice to support a claim of breach of the duty of fair representation.

28/Parallel Congressional authorization for union security agreements, such as pre-hire agreements, covering rank and file "employees" as defined by the National Labor Relations Act is found in 29 U.S.C. § 158(a)(3). Also, 29 U.S.C. § 159(a), the exclusive representation section of the NLRA, provides for union security in collective bargaining. In pertinent part, 29 U.S.C. § 159(a) provides:

> "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (emphasis supplied)

The provision authorizing pre-hire contracts in the construction industry is 29 U.S.C. § 158(f).

29/ See generally McCoy, Current State Action Theories, the Jackson Nexus Requirement, and Employee Discharges by Semi-Public and State-Aided Institutions, 31 Vand.L.Rev. 785, 788 n.19 (May 1978).

30/The Farrell Operating Differential Subsidy ("ODS") Voucher for payment of subsidy in 1978 reveals that under Farrell's ODS contract with the United States, Farrell received $24,-421,122.09, the vast majority representing government payments for wages and crew fringe benefits. The American Export Line ODS

Voucher for 1978, shows that, pursuant to the AEL operating differential subsidy contract with the United States, close to $32.5 millions were received in calendar year 1978. The cumulative total is thus in excess of $56 million.

31/Every ship operated by Farrell Lines at the time of trial was built with the United States paying approximately 50% of the purchase price. With respect to the original Farrell Lines ships alone, the sum of United States assistance equals $133,148,960.

32/Under Title XI of the Merchant Marine Act of 1936, as amended (46 U.S.C. §§ 1271-1281), the United States guarantees the payment of bonds or notes issued to defray that portion of the ships' purchase price not paid pursuant to a construction differential subsidy. Furthermore, the United States pledges its full faith and credit for the payment of both principal and interest under its guarantee obligations. 46 U.S.C. § 1273.

33/Such routes must be "determined by the Secretary of Commerce to be essential for the promotion, development, expansion and maintenance of the foreign commerce of the United States . . .." 46 U.S.C. § 1121(a). See also 46 U.S.C. § 1171. Farrell cannot operate any of its ships on routes other than those listed in its contract without the approval of the Secretary of Commerce. Any alteration in routes on which Farrell ships sail requires the approval of the United States. Changes in shipping schedules likewise re-

quire government approval. The United States also determines when the operator will replace vessels.

34/Pursuant to 46 U.S.C. §1131, the Secretary of Commerce has established minimum manning and wage scales, and working conditions for seamen employed on subsidized vessels. 46 C.F.R. Part 255. Manning requirements are included in the Farrell operating differential subsidy contract. In addition to the crew requirements provided for under the Merchant Marine Act of 1936, as amended, the United States extensively regulates the licensing, employment, wages and working conditions of crews employed aboard Farrell ships. The Coard Guard establishes the officer complement required as a minimum on each vessel, and licenses them for the ranks of officers, 46 U.S.C. §§ 221, 222, 223, 224, 226, 228. Before any ship may sail for a foreign port it must file shipping articles, containing, inter alia, the agreement of each member of the crew to serve on the vessel and stating the length of the voyage, the amount of wages, and the regulations for conduct on board. 46 U.S.C. § 564. The Coast Guard supervises the execution of these articles. 46 U.S.C. §565. In addition, the Coast Guard must inspect the crew quarters once each month, or whenever such vessel enters an American port, to determine if they are clean and sanitary and properly equipped. 46 U.S.C. § 660a. The working conditions are extensively regulated. See, e. g., 46 U.S.C. §§ 653, 654 and §§ 666-670, and 673.

35/Although Marad may sometimes disregard provisions in a collective bargaining contract for the purposes of computing a subsidy, it is not empowered to overturn provisions of a contract between a fleetowner and statutory employees which are fair, reasonable and bargained for at arm's length. See American Export Isbrandtsen Lines, Inc. v. United States, 499 F.2d 552, 576-86, 204 Ct.Cl. 424 (1974) (delineating standard of review Marad must follow where contracts are bargained for under 29 U.S.C. § 159(a)).

36/ For a background summary of the legislative purpose underlying passage of the Merchant Marine Act of 1970, see Sen.Rep. No. 91-1080, wherein the Senate Commerce Committee said, inter alia , "The merchant marine has been appropriately termed our fourth arm of defense." See also "Marad '77" Annual Report of the Maritime Administration for Fiscal Year 1977, U.S. Department of Commerce, 1978.

37/See Wahba v. New York University, 492 F.2d 96, 102 and 103 (2d Cir. 1974).

38/See footnote 36.

39/See footnotes 30 through 34.

40/See footnotes 33 and 44.

41/See footnotes 15 and text accompanying footnote 15.

42/See footnote 43.

43/See Runyon v. McCrary, 427 U.S. 160, 175, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1975); NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958); Buckley v. Valeo, 424 U.S. 1, 15, 96, S.Ct. 612, 46 L.Ed.2d 659 (1976); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963).

44/See Buckley v. Valeo, supra at note 43 hereof, for the proposition that the First Amendment freedoms of speech and association are "closely allied." 424 U.S. at 25, 96 S.Ct. 612.

45/See also footnote 43.

46/In Abood, supra, the Supreme Court considered the permissible reach of a Michigan labor statute which contained a majority representation provision. 431 U.S. at 223-24, 97 S.Ct. 1782.

47/See e.g. note 28, supra.

48/For a general discussion of the various types of union security agreements, see R. Gorman, Basic Text on Labor Law Unionization and Collective Bargaining (1976), Ch. 28.

49/The case law discussion of the rights of individuals with respect to political expression in the text accompanying this footnote presupposes that the union is the proper representative to assert a collective economic position and then elaborates the dissenters' rights. See generally Comment, The Regulation of Union Political Activity: Majority and

Minority Rights and Remedies, 126 U.Pa. L.Rev. 386 (1977).

50/S.Rep.No.105, 80th Cong., 1st Sess. (1947) at 5, quoted in Beasley v. Food Fair of North Carolina, 416 U.S. 653, 662, 94 S.Ct. 2023, 40 L.Ed.2d 443 (1974).

51/See, e.g., 29 U.S.C. § 159(a), as quoted in Footnote 28 hereof.

52/See N.L.R.B. v. Allis Chalmers Mfg. Co., 388 U.S. 175, 180, 87 S.Ct. 2001, 18 L.Ed.2d 1123, rehearing denied, 389 U.S. 892, 88 S.Ct. 13, 19 L.Ed. 2d 202 (1967); Labor Board v. Jones & Laughlin, 301 U.S. 1, 33, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

53/In Gissel, supra, the Supreme Court held inter alia, that a union could establish a bargaining obligation by means other than a National Labor Relations Board election. 395 U.S. at 596-97, 89 S.Ct. 1918.

54/As stated by the Supreme Court in Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946): "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."
Id. at 684, 66 S.Ct. at 77 (footnotes omitted).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE, and GARY W. LUECK,

79 Civ. 1372 (RWS)

Plaintiffs,

vs.

FARRELL LINES, INC.; INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO; BROTHERHOOD OF MARINE OFFICERS, DISTRICT 1, MEBA, AFL-CIO; and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Defendants.

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JUDGMENT AND ORDER

This action came on for hearing before the Court, Honorable Robert W. Sweet, District Judge, presiding, on a motion by plaintiffs for a preliminary injunction, and the issues having been duly tried, and the Court after said hearing having ordered that the trial of the

action on the merits be advanced and consolidated with the preliminary injunction hearing pursuant to Rule 65(a)(2), Fed.R. Civ.P., and the Court having rendered an Opinion, dated July 13, 1979 containing its findings of fact and conclusions of law, it is hereby

ADJUDGED AND DECLARED that after the election provided for herein ("the Election") it shall be unlawful, as in violation of the First Amendment to the United States Constitution, for the defendant Farrell Lines, Inc. ("Farrell"), to recognize any defendant herein or any other labor organization as an exclusive bargaining agent for deck officers regularly employed by Farrell unless such organization has been so elected or otherwise chosen as the collective bargaining agent by a majority of such deck officers eligible to vote in the Election; and it

is further

ADJUDGED AND DECLARED that after the Election, it shall be unlawful, as in violation of the First Amendment to the United States Constitution, for the defendant Farrell, the defendant International Organization of Master, Mates and Pilots, AFL-CIO ("MMP"), and/or the defendant Brotherhood of Marine Officers, District 1, MEBA, AFL-CIO ("BMO"), to condition employment with Farrell as a deck officer, on membership in a labor organization unless such organization has been so elected or otherwise selected as the collective bargaining agent by a majority of such deck officers eligible to vote in the Election; and it is further

ORDERED that the Election shall be held by secret ballot, as hereinafter provided, to determine whether any collective bargaining agent represents the

majority of the deck officers eligible to vote at the time of the election upon submission to the Special Master, appointed below, of membership cards, pledge cards, or other "showing of interest" of the type customarily recognized by the National Labor Relations Board, from 30% of the deck officers eligible to vote in the Election; and it is further

ORDERED that the deck officers who shall be eligible to vote in the Election shall be the following:

> (i) deck officers on the seniority and/or select list of Farrell or American Export Lines, Inc. ("AEL") on February 28, 1979;
>
> (ii) deck officers actually employed on a Farrell ship in February 1979;
>
> (iii) deck officers on paid vacation or paid sick leave from a Farrell ship in February 1979 and returned or scheduled by the aforesaid seniority and/or select lists to return to Farrell employment at the end of such vacation or sick leave;

(iv) port relief officers employed by Farrell in the one-year period commencing March 1, 1978, who were so employed for at least 300 hours in that period; and

(v) any other deck officers employed by Farrell whose employment would have entitled them to vested rights under either the MMP or BMO pension benefit plan for the period March, 1978 to February 28, 1979; and it is further

ORDERED that MMP, BMO and any other collective bargaining agent shall each be afforded a full, fair and equal opportunity to participate in the Election; and it is further

ORDERED that Eric Schmertz, Esq., is hereby appointed as a Special Master herein, pursuant to Rule 53, Fed.R.Civ.P., to report to the Court as expeditiously as may be practicable, after such hearings, proofs, submissions and/or arguments, if any, as he shall deem necessary and proper, as follows:

(i) the names of the deck officers employed by Farrell eligible to

vote as set forth above;

(ii) the receipt of a sufficient "showing of interest" to warrant the Election and the party or parties submitting such showing;

(iii) the form of the ballot to be used in the Election;

(iv) the time, manner and place such ballots shall be (a) made available to and cast by deck officers eligible to vote in the Election, (b) collected for tallying purposes, and (c) tallied;

(v) the time and manner in which any collective bargaining agent was selected by a majority of the valid ballots cast; and it is further

ORDERED, that any party shall be entitled to apply to this Court for other and further relief in accordance with the decision of the Court dated July 13, 1979; and it is further

ORDERED, that this Court shall reserve jurisdiction herein for all purposes until the entry of a final judgment herein.

ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
September 14, 1979

JUDGMENT ENTERED:

September 18, 1979

RAYMOND F. BURGHARDT
Clerk

APPENDIX II

Appendix II

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket Nos. 79-7716, 79-7717
May 12, 1980

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WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY W. LUECK,

Plaintiffs-Appellees,

-against-

FARRELL LINES, INC. and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Defendants-Appellants,

-and-

BROTHERHOOD OF MARINE OFFICERS, DISTRICT 1, MEBA, AFL-CIO, and AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS,

Defendants.

----------x

Before OAKES, VAN GRAAFEILAND and NEWMAN,
Circuit Judges.

OAKES, Circuit Judge:

This appeal, by an employer and a union, is from a decision of the United States District Court for the Southern District of New York, Robert W. Sweet, Judge, holding that, once an employer agrees to bargain collectively with supervisors who have no statutory right to organize, they have a freedom of association First Amendment right to a determination that the union representing them is favored by a majority of its members. Jensen v. Farrell Lines, Inc., 477 F.Supp. 335 (S.D.N.Y. 1979). We are not persuaded that there was state action here, nor are we persuaded that, even if there were, the plaintiff-appellee supervisors had any such First Amendment right. We therefore reverse.

FACTS

Plaintiff-appellee are ten licensed deck officers and engineers who are

supervisory employees in the maritime shipping indistry. They were all employed for a substantial period of time aboard certain vessels formerly owned and operated by American Export Lines, Inc. (AEL). They were also members of the Brotherhood of Marine Officers, District One, National Marine Engineers Beneficial Association, AFL-CIO (BMO), a defendant below but not a party here.

Defendant-appellant employer is Farrell Lines, Inc. (Farrell), a United States flag shipping line operating merchant cargo and bulk carriage vessels, which acquired AEL's twenty-five owned or operated ships in a sale pursuant to a reorganization plan resulting from proceedings under Chapter XI of the Bankruptcy Act, 11 U.S.C. §§701-799 (1976). Defendant-appellant union is the International Organization of Masters, Mates

and Pilots, AFL-CIO (MMP).

Appellees are only ten out of approximately 180 former AEL supervisors who were members of and exclusively represented by BMO. Farrell owned or operated fourteen of its own ships immediately prior to its acquisition of AEL's vessels; as such, it was a party to a multi-employer collective bargaining agreement with MMP. The agreement provided that all licensed deck officers employed by Farrell must be members of MMP.

Upon Farrell's integration of the AEL ships into its own operations, Farrell signed an agreement with BMO on March 28, 1978, continuing the AEL-BMO collective bargaining agreement. Later, Farrell negotiated with BMO a wage increase for the employees covered under the old AEL-BMO contract. Shortly after

the bankruptcy purchase, however, MMP asserted that it, not BMO, was entitled to represent all licensed deck officers employed by Farrell, and through its parent union (the International Longshoremen's Association) initiated proceedings before the AFL-CIO under Article XX of the AFL-CIO Constitution. BMO, through its parent union, counterclaimed, asserting BMO's representation rights. The AFL-CIO arbitrator found that the Farrell purchase constituted an "accretion" of the AEL fleet to the Farrell fleet and that, primarily because the MMP contract provided for accretions, whereas the BMO contract did not, the MMP contract was to be given effect. This decision was affirmed in an appeal to the AFL-CIO Executive Council.

Farrell then informed the former AEL supervisors that, as a condition of

continued employment with Farrell, they would have to leave BMO and join MMP, Farrell also discontinued its pension, health, and vacation pay contributions to BMO under the old AEL contract and began to make all contributions to the MMP plan.

MMP on its part offered the former AEL supervisors, including appellees, membership in MMP on terms that, among other things, granted them the highest available seniority status of three grades accorded employees under the MMP contract, for jobs aboard all former AEL ships. Many of the former AEL supervisors, but not appellees, accepted MMP's offer.

On March 12, 1979, appellees received notice of the Farrell decision abrogating the BMO collective bargaining agreement, when their former AEL ship,

the C/V Staghound, the first ship to return to the United States following the decision, docked in Baltimore, Maryland. After reaching New York several days later, appellees were informed of the effect of the AFL-CIO Article XX decision and the requirement that they join MMP to continue employment with Farrell. Upon refusing to sign MMP membership cards and leave the vessel, appellees were removed from the Staghound by the New York City police, and this action followed.

THE DECISION BELOW

In the proceedings below, appellees made three basic claims, the first two of which were rejected by the district court and are not in contention here.[1/] The third claim, here on appeal, is that Farrell's enforcement of the Article XX decision is a violation of appellees'

First Amendment right to freedom of association, because it forces them to join a union that has not been freely selected by them or by a majority of Farrell's deck officers as a condition of their continued employment. After evidentiary hearings on an application for preliminary relief, the court below, properly exercising its discretion under Fed.R.Civ.P. 65(a)(2), ordered that the trial of the action on the merits be advanced and consolidated with the preliminary injunction hearing. The court found, 477 F.Supp. at 346, correctly, that subject matter jurisdiction over the constitutional claim existed under 28 U.S.C. §1331. Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946); Evans v. American Federation of Television and Radio Artists, 354 F.Supp. 823, 837 (S.D.N.Y. 1973), rev'd on other

grounds sub nom. Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir.), cert. denied, 419 U.S. 1093, 95 S.Ct. 688, 42 L.Ed.2d 687 (1974). The court below also held, 477 F.Supp. at 347-48, that appellees had standing to bring their consitutional claim, despite appellant's argument below that MMP benefits may have equaled or exceeded those of BMO and despite appellees' opportunity to join MMP. The court found that appellees had shown a definite injury and personal stake in the outcome, occasioned by their loss of employment, and that they had lost a valuable right of being represented by a majority-selected union. The court posited a further independent basis for standing in that there were significant differences between the operation of the two collective bargaining

agreements relating to vacation benefits, seniority, selection of billets, and overtime payments, among other things. Id. at 348. The opinion noted that the third claim in effect challenged the maritime industry's practice of engaging in pre-hire collective bargaining contracts, i.e., a contract between a shipowner and a union requiring supervisory employees to join that union before any ships are built or supervisors are hired. Id. at 350.

Before reaching the merits of the constitutional claim, the district court found that the requisite state action existed, whether in terms of "interdependence," "symbiosis," or "nexus." Id. at 350-53. see Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 357-58, 95 S.Ct. 449, 453, 456-57, 42 L.Ed.2d 477 (1974); Burton v. Wilmington

Parking Authority, 365 U.S. 715, 722, 725, 81 S.Ct. 856, 860, 861 6 L.Ed.2d 45 (1961). See also Graseck v. Mauceri, 582 F.2d 203, 209-10 (2d Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 91 (1979). The court relied on several elements: (1) the fact that, in the maritime industry, there is a government operating subsidy to the employer resulting from the differential between wages paid union members and wages paid employees performing similar functions in foreign fleets; (2) evidence indicating that Farrell received a cumulative sum exceeding $56 million in subsidies for operating costs, principally costs under collective bargaining contracts; (3) proof that Farrell not only received construction-differential subsidies for the construction of its ships from the United States govern-

ment, but also received guarantees of its bonds and notes issued to provide financing.[2/]

Furthermore, the court noted that routes for which subsidies are received must be approved by the Government and that the United States regulates extensively the manning and wage scales of officers and seamen serving aboard Farrell ships. Federal law provides for Maritime Administration review of the fleetowner's collective bargaining costs before it may receive the so-called operating-differential subsidy. 46 U.S. C. § 1173(b). Finally, the legislative history of the Merchant Marine Act of 1970 establishes that a primary purpose of the subsidies is to ensure a national maritime industry as an element in our national security. See [1970] U.S. Code Cong. & Admin.News. p. 4188. In short,

the court concluded that the "merchant marine carries out a specific governmental function of vital interest to the national defense," and that Farrell "is a heavily subsidized private firm which has had its decisionmaking power greatly circumscribed by an extensive governmental regulatory scheme." 477 F.Supp. at 353 (footnotes omitted).

Reaching the merits, the court held that although Congress can deny supervisors the same right to organize that it grants to statutory employees, so that there is no absolute right for supervisory employees to bargain collectively, once an employer agrees to bargain collectively and sets terms and conditions of employment, supervisors have a First Amendment freedom of association right to a determination that the union representing them is majority-

chosen. Id. at 353-56. The court took as a given the idea that among the individual rights protected by the First Amendment is the freedom of association. Id. at 353 (citing Abood v. Detroit Board of Education, 431 U.S. 209, 233, 97 S.Ct. 1782, 1798, 52 L.Ed.2d 261 (1977); Runyon v. McCrary, 427 U.S. 160, 175, 96 S.Ct. 2586, 2596, 49 L.Ed.2d 415 (1976); Buckley v. Valeo, 424 U.S. 1, 15, 96 S. Ct. 612, 632, 46 L.Ed.2d 659 (1976)(per curiam); NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963); NAACP v. Alabama, 357 U.S. 449, 460, 78 S.Ct. 1163, 1170, 2 L.Ed.2d 1488 (1958). Judge Sweet viewed that freedom as including its converse, the freedom not to associate or be compelled to join in a group or association against one's will, relying upon Wooley v. Maynard, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed.2d

752 (1977) (freedom of speech includes freedom to refrain from speaking), and Railway Employees' Department v. Hanson, 351 U.S. 225 76 S.Ct. 714, 100 L.Ed. 1112 (1956)(by implication). 477 F.Supp. at 353. First Amendment protection, the court found, extends to and encompasses association in an ecomomic context. Id. at 354 (citing Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed.430 (1945)). Then, referring to cases finding statutory infringements of associational rights constitutional, e.g., Abood v. Detroit Board of Education, supra, 431 U.S. at 259, 97 S.Ct. at 1811 (Powell, J., concurring); CSC v. Letter Carriers, 413 U.S. 548, 556, 607 93 S.Ct. 2880, 2886, 2891, 37 L.Ed.2d 796 (1973); Railway Employees' Department v. Hanson, supra, 351 U.S. at 233-35, 76 S.Ct. at 718-719, the court went on to say that the required

balancing is between the seriousness of the restriction on plaintiffs' rights and the governmental interest in leaving the challenged practice intact. 477 F.Supp. at 354. It held that the balance tipped in the employees' favor, on the basis that absent the safeguard of majority representation, the de facto union shop agreement here is overly and unnecessarily restrictive.

The relief granted below, id. at 356-57, was the holding of an election or implementation of a process, such as union card authorization, designed to establish the majority status of the unions involved. Analogizing the constitutional right to the statutory right available to nonsupervisory employees, the court declared that the status quo would not be immediately dislodged. Only if it were subsequently determined that MMP

is not supported by the majority of the personnel in the relevant fleetwide unit, the court stated, would it be determined that plaintiffs' constitutional rights have been violated. Subsequently, those eligible to vote in an election were declared to be deck officers on the seniority or select list of Farrell or AEL on February 28, 1979, deck officers actually employed on Farrell ships or on paid vacation or paid sick leave, and certain other employees immaterial here.

DISCUSSION

A. Jurisdiction and Cause of Action.

[1,2] The district court below properly found subject matter jurisdiction under § 1331(a), 477 F.Supp. at 346, since the constitutional claim stated is not "wholly insubstantial and frivolous." Bell v. Hood, supra, 327 U.S. at 682-83, 66 S.Ct. at 776; see Duke

Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 70, 98 S.Ct. 2620, 2629, 57 L.Ed.2d 595 (1978); Turpin v. Mailet, 579 F.2d 152, 155 n.3 (2d Cir.), vacated on other grounds, 439 U.S. 974, 99 S.Ct. 554, 58 L.Ed.2d 645 (1978). The court also correctly held that a cause of action existed for both declaratory and injunctive relief from the court. 477 F.Supp. at 346 & n. 22, 357 n. 54. Declaratory relief is expressly authorized under 28 U.S.C. §2201. Availability of federal equitable relief to remedy constitutional violations has been presumed by the courts. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 404, 91 S.Ct. 1999, 2008, 29 L.Ed.2d 619 (1971)(Harlan, J., concurring). The court in Bell v. Hood, supra, stated that "it is the established practice for this

Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution. . . .. Moreover, where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." 327 U.S. at 684, 66 S.Ct. at 777 (footnotes omitted); see, e.g., Davis v. Passman, 422 U.S. 228, 242-43, 99 S.Ct. 2264, 2275-2276, 60 L.Ed.2d 846 (1979); Porter v. Califano, 592 F.2d 770, 781 (5th Cir. 1979); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 409 F.2d 718, 723 (2d Cir. 1969), rev'd and remanded on other grounds, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). See generally Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv.L.Rev.

1532, 1540-43 (1972).[3/]

B. State Action

As the opinion for the Court in Hudgens v. NLRB, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976), shows, there is no dearth of cases in respect to the question of state action in a First Amendment context. We do know that the constitutional guarantee of free speech extends only to abridgments by federal or state government. See Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 114, 93 S.Ct. 2080, 2092, 36 L.Ed.2d 772 (1973). We also know that the concept of what constitutes state action is a blurred one that the Supreme Court itself has had trouble clarifying. See Hudgens, supra, 424 U.S. at 517-20, 96 S.Ct. at 1035-1036 (indicating that Lloyd Corp. V. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d

131 (1972), which purported to distinguish Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603 (1968), actually overruled it, just as Mr. Justice Marshall, dissenting in Lloyd, saw the situation, 407 U.S. at 571, 92 S.Ct. at 2230); Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 349-50, 95 S.Ct. at 453. ("[T]he question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." (citations omitted)).

Generally speaking, there appear to be at least two general approaches that the Court has used to determine whether seemingly private action is in fact state action. One is the state-function approach, in which courts must find that the conduct of the private actor is equivalent to the performing of a state

function, or is traditionally associated with sovereignty. It is not enough if the private entity is merely affected with the public interest; it must exercise powers "traditionally exclusively reserved to the State." Id. at 352, 95 S.Ct. at 454.[4/]

The other general approach is to examine the conduct of the private actor and ask whether the state and the private actor have a "symbiotic relationship," id. at 357, 95 S.Ct. at 457, making them so significantly involved with one another as to render the private actor subject to the constitutional responsibilities of the state. Compare Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725, 81 S.Ct. at 861 (finding state action on the part of a restaurant leasing from a publicly owned and operated parking building),

with Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972)(finding no state action on part of private club enjoying benefits of state liquor license). See generally J. Choper, Y. Kamisar & L. Tribe, The Supreme Court: Trends and Developments 1978-1979, at 265-77 (1979) [hereinafter cited as Choper, Kamisar & Tribe]; Note, State Action: Theories For Applying Constitutional Restrictions to Private Activity, 74 Colum.L.Rev. 656 (1974). A related inquiry asks "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 351, 95 S.Ct. at 453. Our opinion in

Graseck v. Mauceri, supra, 582 F.2d at 207-12, indicates the difficulty of applying this second general approach in any given case.

Following the Court's admonition that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance," Burton v. Wilmington Parking Authority, supra, 365 U.S. at 722, 81 S.Ct. at 860, we nevertheless hold in this close case that Farrell's actions do not constitute state action.

[3] First, we do not find that Farrell performs a state function, recognizing the difficulty of finding state action under the state-function approach. See Choper, Kamisar & Tribe, supra, at 271.[5/] Farrell does not exercise powers "traditionally exclusively

reserved to the State," Jackson v. Metropolitan Edison, Co., supra, 419 U.S. at 352, 95 S.Ct. at 454, "traditionally associated with sovereignty," id. at 353, 95 S.Ct. at 454 or "traditionally the exclusive prerogative of the State," id. See also Flagg Bros. v. Brooks, 436 U.S. 149, 158, 98 S.Ct. 1729, 1734, 56 L.Ed.2d 185 (1978)("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'") Operating a merchant marine has never been a function exclusively reserved to government. Although federal support of the merchant marine is undoubtedly in the national interest, it does not follow that its operations are exclusively sovereign in nature. Indeed, the Merchant Marine Act itself recognizes the

private character of the industry. The Act's Declaration of Policy discusses the necessity of a merchant marine "owned and operated . . . by citizens of the United States." 46 U.S.C. § 1101(c).

Appellees' strongest argument, also drawn from the Act's Declaration of Policy, id. §1101(a),(b), emphasizes the role of the merchant marine as part of our national defense. As described by The Coldwater, 283 F. 146, 148 (S.D. Fla. 1922):

> [I]t is apparent that the United States, in the maintenance and operation of the merchant marine, is not engaged in a purely commercial enterprise, but that, on the contrary, Congress conceived that the establishment and operation of the merchant marine was the exercise of a governmental function of the highest importance. . . ..

The legislative history of the Merchant Marine Act of 1970 notes: "The merchant marine has been appropriately termed

our fourth arm of defense. To permit our security and economy to become totally dependent upon foreign vessels, operated by foreign crews, subject to the wishes of foreign governments would be to run an unacceptable risk." S.Rep.No. 1080, 91st Cong., 2d Sess., reprinted in [1970] U.S.Code Cong. & Admin.News., pp. 4188, 4190.

The argument, then, suggests that the American merchant marine does serve a state function -- national defense -- as a naval and military auxiliary. To this end, the Secretary of Commerce may acquire ships he deems necessary for the purposes of the Merchant Marine Act. 46 U.S.C. § 1125. He may also have new ships constructed or old ones reconditioned, and demise such vessels to private owners for operation on essential trade routes. Id. §§ 1192, 1204.

[4] But in all such governmental interventions or takeovers, the Act specifically requires the Government to provide just compensation to the private owner, e.g., id. at §1242, thereby carefully maintaining the distinction between public and private property. The merchant marine is thus quite unlike the United States Navy or Coast Guard, for example, where the fleet is completely owned and operated by the federal government. The very fact that private property is subject to governmental taking cannot be sufficient to make the private owner's actions a state function -- after all, the Government's eminent domain powers extend to all private property upon a showing of public purpose. U.S.Const. Amend. V; see, e.g., Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98,99 L.Ed. 27 (1954). While Farrell's operations are

certainly affected with the public interest, Farrell evidently does not perform a state function for state action purposes.

One must "divide/A hair 'twixt south, and south-west side" to determine whether there is a symbiotic relationship between Farrell and the United States Government, or a close enough nexus between the Government and the challenged action to find state action here. The Court in Burton v. Wilmington Parking Authority, supra, posed the issue as whether "[t]he State has so far insinuated itself into a position of interdependence with [the private actor] that it must be recognized as a joint participant in the challenged activity." 365 U.S. at 725, 81 S.Ct. at 862.[6/]

We earlier summarized the elements relied on by the district court below

to find state action, elements showing the general relationship between the United States Government and the maritime industry's fleet owners. The court's opinion ably detailed the web of governmental subsidy and regulation directed at Farrell. But it is not enough that the private entity received some governmental funding. See, e.g., Moose Lodge No. 107 v. Irvis, supra, 407 U.S. at 173, 92 S.Ct. at 1971; Graseck v. Mauceri, supra, 582 F.2d at 207-08; Lefcourt v. Legal Aid Society, 445 F.2d 1150, 1155 (2d Cir. 1971)(substantial governmental funding of Legal Aid Society inadequate to create state action, absent showing of government control, regulation, or interference). Unlike the situation in Holodnak v. Avco Corp., 514 F.2d 285, 289 (2d Cir.), cert. denied, 423 U.S. 892, 96 S.Ct. 188, 46 L.Ed.2d 123 (1975), where

all the land and most of the buildings and equipment were government-owned, as well as the more recent Janusaitis v. Middlebury Volunteer Fire Department, 607 F.2d 17, 21 (2d Cir. 1979), where land, building, and equipment were all government-owned, Farrell's financial dependence is not so complete. Furthermore, in Holodnak, the majority of work at the plant was under government contract, involving the construction of defense-related equipment. 514 F.2d at 289. Here, the construction and operation of American private ships, while undeniably helpful to United States foreign trade and military capability, is less directly connected to the Government. Commonality of economic interests does not itself create a symbiotic relationship. Wahba v. New York University, 492 F.2d 96, 100-01 (2d Cir.),

cert. denied, 419 U.S. 874, 95 S.Ct. 135, 42 L.Ed.2d 113 (1974).

Nor is it sufficient that there is extensive and detailed regulation of the private conduct. Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 350, 95 S.Ct. at 453. Rather, factors in addition to government funding and regulation must be present. See Weise v. Syracuse University, 522 F.2d 397, 405 (2d Cir. 1975)(funding and regulation insufficient to establish state action). The Government not only does not own Farrell's ships or any of its equipment, but no federal officials are maintained aboard the vessels to supervise or monitor Farrell's operations. See Holodnak v. Avco Corp., supra, 514 F.2d at 289 (substantial government task force maintained at plant to assure contract compliance and product quality, and to

audit accounts).

If as a general matter the Government has not "insinuated itself into a position of interdepencence," Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725, 81 S.Ct. at 862, it has also not acted so as to create a specific nexus between itself and the challenged action. The Government does not pass upon Farrell's recognition of unions as exclusive bargaining agents; even if it did, acquiescence in the decision would probably be insufficient to convert the private action into state action; Flagg Bros. v. Brooks, supra, 436 U.S. at 164, 98 S.Ct. at 1737; Holodnak v. Avco Corp., supra, 514 F.2d at 288. There was no "imprimatur placed on the practice of [Farrell] about which [appellees] complain[ ]," and the Government has not "put its weight on

the side of the [contested] practice by ordering it." Jackson v. Metropolitan Edison Co., supra, 419 U.S. at 357, 95 S.Ct. at 457; see Schlein v. Milford Hospital, Inc., 561 F.2d 427, 429 (2d Cir. 1977)(per curiam). The Government's "power, property and prestige" were not placed behind the actions at issue. Burton v. Wilmington Parking Authority, supra, 365 U.S. at 725, 81 S.Ct. at 861.

On balance, then, Farrell's decision to recognize MMP as the exclusive bargaining agent and to discharge appellees following their refusal to satisfy MMP membership requirements was not state action. Since the question is a close one, however, and because reasonable judges could readily decide it another way, we will assume arguendo the requisite state action and reach the merits

of the First Amendment claim.

C. First Amendment Rights

[5] Appellees' constitutional claim is that their First Amendment right of association was impermissibly infringed by Farrell's dismissal of them due to their refusal to join MMP and pay union dues -- an infringement that could be cured only by majority selection of a union as the exclusive bargaining agent for Farrell's deck officers and engineers. We being our discussion by noting once again that as supervisors, appellees are excluded from the protection of the National Labor Relations Act, 29 U.S.C. §§ 152(3), 164(a). The district court properly held, and appellees do not now disagree, that no federal common law of labor would support a finding of an unfair labor practice constituting by im-

plication a breach of contract actionable under 29 U.S.C. § 185. See note 1 supra.

Nor do appellees have a constitutional right to compel Farrell to accede to their preference for union representation. As held in Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 99 S.Ct. 1826, 60 L.Ed.2d 360 (1979)(per curiam), a highway commission's refusal to consider employee grievances when filed by a union on behalf of an employee, rather than when filed directly by an employee of the department, does not violate the First Amendment. The Court assumed that if public employers were subject to the same labor laws applicable to private employers, the refusal might constitute an unfair labor practice under the National Labor Relations Act, but held that such impairment of the

union's effectiveness in representing the ecnommic interests of its members was nevertheless not prohibited by the Constitution. As the Court noted, "the First Amendment is not a substitute for the national labor relations laws." Id. at 464, 99 S.Ct. at 1827.

The later case of Babbitt v. United Farm Workers National Union, 442 U.S. 289, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979), is also instructive. The Court held that Arizona was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate. Id. at 313, 99 S.Ct. at 2316. Even assuming that Arizona's statutory election procedures might frustrate rather than facilitate democratic selection of bargaining representatives, id. at 300, 99 S.Ct. at

2310, the court said the statute presented "as a general matter no First Amendment problems," id. at 313, 99 S.Ct. at 2316. (footnote omitted).[7/]

[6,7] The import of these two cases, then, is that the Constitution poses no inherent barrier to employers who wish to recognize any union they choose or no union at all. See Hanover Township Federation of Teachers Local 1954 v. Hanover Community School Corp., 457 F.2d 456, 460-61 (7th Cir. 1972)(Stevens, J.). Only a statutory command from Congress can yield different results. Thus, Farrell could decide that it would recognize only MMP, or only BMO, or no union of supervisors, and still not violate the Constitution, even though purely contractual obligations might be violated.

The district court was willing to accept Farrell's freedoms as outlined

above, but argued that the Constitution requires majority selection of a union serving as exclusive bargaining agent. The Supreme Court has established, however, that compulsory financial support of a union shop in its collective-bargaining, contract-administration, and grievance-adjudgment activities does not in and of itself impermissibly infringe the right of association. Abood v. Detroit Board of Education, supra, 431 U.S. at 222, 225-26, 97 S.Ct. at 1792, 1794-1795; International Association of Machinists v. Street, 367 U.S. 740, 746-49, 81 S.Ct. 1784, 1788-1789, 6 L.Ed.2d 1141 (1961); Railway Employees' Department v. Hanson, supra, 351 U.S. at 236-38, 76 S.Ct. at 729-21. Appellees have not alleged thatMMP would use their dues to promote ideological causes in contravention of their beliefs. If Congress in

its judgment can authorize the union shop for employer-employee collective bargaining, without violating the Constitution, Abood v. Detroit Board of Education, supra, 431 U.S. at 222, 97 S.Ct. at 1792, then it is difficult to see how supervisors specifically excluded from coverage under the National Labor Relations Act can allege greater constitutional protection.

Appellees argue that "[c]ritical to the judgment in Hanson and Street were the provisions providing for democratic selection by majority vote of the collective bartaining agent," Brief of Appellees at 47, and that Abood emphasizes the majority selection provision under the Michigan labor law, id. at 48. But we do not find such reliance in the Court's opinions, nor do we perceive the safeguard of majority

selection as essential to the constitutionality of exclusive union representation. To this effect, the Court in Babbitt v. United Farm Workers National Union, supra, upheld the Arizona statutory election procedure even though it prevented many employees from participating in the election of the collective bargaining agent, 442 U.S. at 294 & n.5, 99 S.Ct. at 2307. The district court implied that the infringement here was greater than in Hanson, Street or Abood because MMP itself had apparently never been chosen by a majority selection process, but rather was a product of the pre-hire system utilized in the maritime industry. 477 F.Supp. at 350 & n.28, 354. We do not agree that such a distinction is dispositive. In Lathrop v. Donohue, 367 U.S. 820, 842-43, 81 S.Ct. 1826, 1837-1838, 6 L.Ed.2d 1191

(1961), compulsory state bar membership imposed by the state's highest court was upheld under the Hanson rationale as not constituting any invalid impingement upon protected rights of association, even though lawyers would never have a chance to vote for or against the bar organization.

Moreover, Farrell's recognition of MMP is consistent with nearly two decades of National Labor Relations Board policy supporting the so-called "accretion doctrine," under which the purchaser's union in a shipping industry acquisition has the right to man newly acquired vessels. See NLRB v. National Maritime Union, 486 F.2d 907, 913 (2d Cir. 1973), cert. denied, 416 U.S. 970, 94 S.Ct. 1993, 40 L.Ed.2d 559 (1974); Moore-McCormack Lines, Inc., 139 N.L.R.B. 796, 798-99 (1962). Transfers of ships are fairly

common in the industry, and the doctrine serves to avoid constant disruption. See NLRB v. National Maritime Union, supra, 486 F.2d at 913.

We also note that MMP agreed to seek orderly resolution of the dispute with BMO that arose upon Farrell's acquisition of AEL. Thus, appellees had an opportunity through their union to persuade the AFL-CIO Article XX arbitrator of any special circumstances warranting disregard of the "accretion doctrine." But the arbitrator held that the doctrine was controlling and that, since the MMP contract provided for accretion whereas the BMO contract, did not, the MMP agreement survived, No other administrative forum was readily available to resolve this dispute that had importance not only to the interested parties but to others similarly situated throughout the nation.

Of course, we are not bound by the ruling of the AFL-CIO arbitrator. But we do take notice that the Article XX proceeding and application of the "accretion doctrine" provided a means of avoiding precisely the sort of interunion rivalry and possible labor strike that the national labor laws were designed to prevent. Should we find an overriding First Amendment right here, we can imagine that whenever a smaller number of vessels, or even one vessel, accretes into a larger fleet, the supervisors aboard the acquired vessel(s) could demand an election to determine what union represented the majority. Where such a doctrine would lead us is difficult to foresee, for to carry it a step further, any time a new supervisor was hired, or existing supervisors changed union allegiances, they would be able to

call for new elections, citing their freedom of association rights. These considerations are certainly cognizable by the courts in determining the substantiality of an assertion of a First Amendment right. See Abood v. Detroit Board of Education, supra, 431 U.S. at 220-23, 97 S.Ct. at 1791-1793.

Finally, if the election ordered by the district court were held, and BMO won, the MMP-Farrell agreement would then be abrogated and MMP would lose its bargaining status. In the absence of any other agreement, and Farrell could not be required to enter into one, the Farrell deck officers and engineers other than appellees, including those former BMO members who joined MMP, could lose their benefits under the MMP-Farrell agreement. Here, as in the case of International

Organization of Masters, Mates and Pilots v. NLRB (Cove Tankers Corp.), 575 F.2d 896, 905 (D.C. Cir. 1978), whatever burdens are imposed on First Amendment associational rights by the statutory exemption of supervisors from coverage under the NLRB are outweighed by the countervailing governmental interests.

We accordingly reverse the judgment below.

Footnotes

1/The first claim asserted that defendant appellants committed an unfair labor practice, both under the National Labor Relations Act, 29 U.S.C. § 158, and as a matter of federal common law. This claim was rejected, Jensen v. Farrell Lines, Inc., 477 F.Supp. 335, 344-45 (S.D.N.Y.1979), because appellees are supervisors and hence not employees under the Act, 29 U.S.C. § 152(3), and because federal common law compels no such result. See generally NLRB v. Yeshiva University, ___ U.S. ___, 100 S.Ct. 856, 63 L.Ed.2d 115 (1980). Whether appellees as members of a "labor organization" are entitled to allege unfair labor practices on the part of employer Farrell, under 29 U.S.C. § 158(a)(3), is not before us, since they have not appealed this part of the decision below, 477 F.Supp. at 344.

The second claim asserted that BMO breached its duty of fair representation by not raising certain legal issues during the Article XX proceeding and by ultimately recognizing and accepting the MMP-Farrell contract. The court found against plaintiff-appellees in each instance. Id. at 348-50.

2/See generally Seatrain Shipbuilding Corp. v. Shell Oil Co., ___ U.S. ___, ___, 100 S.Ct. 800, 808, 63 L.Ed.2d 36 (1980) ("Central to the legislative scheme [of the Merchant Marine Act, 1936] was the creation of an arsenal of grant and loan programs for use in the Secretary's efforts to stimulate domestic

construction and make operation by domestic crews competitive").

3/Since damages are not sought, it is unnecessary to determine whether a direct right of action for damages lies in the case of a First Amendment violation as it does in the case of a Fourth, Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), or a Fifth, Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), Amendment violation. Other circuits have found such a right of action. See Dellums v. Powell, 566 F.2d 167, 194-95 (D.C. Cir. 1977), cert. denied, 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); Yiamouyiannis v. Chemical Abstracts Service, 521 F.2d 1392, 1393 (6th Cir. 1975) (per curiam), cert. denied, 439 U.S. 983, 99 S.Ct. 573, 58 L.Ed.2d 654 (1978); Paton v. La Prade, 524 F.2d 862, 869-70 (3d Cir. 1975).

4/Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352, 95 S.Ct. 449, 454, 42 L.Ed.2d 477 (1974), cites several examples of such exercise: Evans v. Newton, 382 U.S. 296, 86 S.Ct. 486, 15 L.Ed.2d 373 (1966) (municipal park); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (1953) (election); Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946) (company town); and Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932) (election).

5/Professor Choper is critical of the Jackson state-function standard, finding it "an unduly narrow definition of what a governmental function is." Choper, Kamisar & Tribe, supra, at 271. He proposes that if a private organization has monopoly power, particularly under a grant of state authority, then it should be charged with the responsibilities of the state. Id.

6/The Court's language is less than clear on the degree of direct connection required, if any, between the Government and the challenged activity of the private party to establish state action. The Court in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), appears to maintain the two separate analyses:

> However detailed this type of regulation may be . . ., it cannot be said to in any way foster or encourage racial discrimination. Nor can it be said to make the State in any realistic sense a partner or even a joint venturer in the club's enterprise.

Id. at 176-77, 92 S.Ct. at 1973. Jackson v. Metropolitan Edison Co., supra, frames part of the state action question in terms of "a sufficiently close nexus between the State and the challenged action of the regulated entity." 419 U.S. at 351, 95 S.Ct. at 453.

Our court has often, although not always, viewed the issues of nexus and an overall symbiotic relationship as separate. See Janusaitis v. Middlebury Volunteer Fire Dep't., 607 F.2d 17, 23 (2d

Cir. 1979) (district court in error to extent that nexus requirement was injected into Burton-type analysis); Holodnak v. Avco Corp., 514 F.2d 285, 288 (2d Cir.), cert. denied, 423 U.S. 892, 96 S.Ct. 188, 46 L.Ed.2d 123 (1975). But cf. Graseck v. Mauceri, supra, 582 F.2d 203, 209 n.22 (2d Cir. 1978), cert. denied, 439 U.S. 1129, 99 S.Ct. 1048, 59 L.Ed.2d 91 (1979) (uncertain whether Burton's "symbiotic relationship" analysis survives Jackson's nexus test); Schlein v. Milford Hospital, Inc., 561 F.2d 427, 428-29 (2d Cir. 1977) (per curiam) (applying nexus test to state's involvement with particular challenged activities, citing Jackson and Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

7/One commentator is critical of Babbitt for apparently "saying that the state does not have to meet any First Amendment burden at all, since it did not have to give the workers a bargaining representative with all this power." Choper, Kamisar & Tribe, The Supreme Court: Trends and Developments 1978-1979, at 318-19 (1979). Professor Tribe suggests that Arizona could not, for example, require all people voting for the bargaining representative to sign a loyalty oath to Arizona ideals, without violating the First Amendment. Id. at 318, 99 S.Ct. at 2319. That there may be some things Farrell, if subject to the First Amendment, would be constitutionally prohibited from doing in regard to union members does not mean that it would be constitutionally required to recognize only a majority-supported union.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of May one thousand nine hundred and eighty.

Present: HON. JAMES L. OAKES

HON. ELLSWORTH A. VAN GRAAFEILAND

HON. JON O. NEWMAN

Circuit Judges,

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WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMONICK BISBANO, et al.

Plaintiffs-Appellees

79-7716,
79-7717

v.

FARRELL LINES, INC., INTERNATIONAL ORGANIZATION OF MASTERS, et al.

Defendants

FARRELL LINES, INC. and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO

Defendants-Appellants

----------x

APPENDIX III

APPENDIX III

1. 29 U.S.C. §152(3):

(3) The term "employee" shall include any employee and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any in-

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dividual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

2. 29 U.S.C. §159:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to

their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes

both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a

bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board --

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently

recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of

representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not

entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

Petition for enforcement or review; transcript

(d) Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in

part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

Secret ballot; limitation of elections

(e)(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 158(a)(3) of this title, of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organization and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within

which, in the preceding twelve-month period, a valid election shall have been held.

3. 29 U.S.C. §164(a):

(a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

4. 46 U.S.C. §564:

Shipping Articles

The master of every vessel bound from a port in the United States to any foreign port other than vessels engaged in trade between the United States and

the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the

intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman.

Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct,which may be sanctioned by Congress or authorized by the Commandant of the Coast

Guard not contrary to or not otherwise provided for by law, which the parties agree to adopt.

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law.

5. 46 U.S.C. §565:

Rules for shipping articles

The following rules shall be observed with respect to agreements:

First. Every agreement, except such as are otherwise specially provided for, shall be signed by each seaman in the presence of a Coast Guard official to whom the duties of shipping commissioner have been delegated.

Second. When the crew is first engaged the agreement shall be signed

in duplicate, and one part shall be retained by such Coast Guard official, and the other part shall contain a special place or form for the description and signatures of persons engaged subsequently to the first departure of the ship and shall be delivered to the master.

Third. Every agreement entered into before such Coast Guard official shall be acknowledged and certified under the hand and official seal of such Coast Guard official. The certificate of acknowledgment shall be indorced on or annexed to the agreement; and shall be in the following form:

"State of_____, County of_____:

"On this____ day of_____, personally appeared before me, a Coast Guard official in and for the said county, A. B., C. D., and E. F.,

severally known to me to be the same persons who executed the foregoing instrument, who each for himself acknowledged to me that he had read or had heard read the same; that he was by me made acquainted with the conditions thereof, and understood the same; and that, while sober and not in a state of intoxication, he signed it freely and voluntarily, for the uses and purposes therein mentioned."

6. 46 U.S.C. §713:

Definitions, schedule, and tables

In the construction of title 53 of the Revised Statutes, every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the "master" thereof; and every person (apprentices excepted) who shall be employed

or engaged to serve in any capacity on board the same shall be deemed and taken to be a "seaman"; and the term "vessel" shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river, to which the provisions of such title may be applicable, and the term "owner" shall be taken and undertstood to comprehend all the several persons, if more than one, to whom the vessel shall belong.

7. 46 U.S.C. §1101:

Fostering development and maintenance of merchant marine

It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-

borne commerce and substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the

United States to foster the development and encourage the maintenance of such a merchant marine.

8. 46 U.S.C. §1151:

Subsidy authorized for vessels to be operated in foreign trade

(a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of

promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred

consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of high transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the pro-

visions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce, in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the purposes and policy of this chapter, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefor providing for the payment by the United

States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this subchapter and under such further conditions and limitations as may be prescribed in the rules and regulations the Secretary of Commerce has adopted as provided in section 1114(b) of this title; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this chapter.

9. 46 U.S.C. §1156:

Operation of subsidy constructed vessel limited to foreign trade; repayments to Secretary for deviations

Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on

any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the

same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

10. 46 U.S.C. §1172:

Determination of necessity of subsidy to meet competition

Except with respect to cruises authorized under section 1183 of this title, no contract for an operating-differential subsidy shall be made by the Secretary of Commerce for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Secretary of Commerce, after a full and complete investigation and hearing, shall determine that an

operating-differential subsidy is necessary to meet competition of foreign-flag ships.

11. 46 U.S.C. §1173:

Contracts for payment of subsidy

(a) If the Secretary of Commerce approves the application, he may enter into a contract with the applicant for the payment of an operating-differential subsidy determined in accordance with the provisions of subsection (b) of this section, for the operation of such vessel or vessels in an essential service and in cruises authorized under section 1183 of this title for a period not exceeding twenty years, and subject to such reasonable terms and conditions, consistent with this chapter, as the Secretary of Commerce shall require to effectuate the purposes and policy of

this chapter, including a performance bond with approved sureties, if such bond is required by the Secretary of Commerce.

(b) Such contract shall provide, except as the parties should agree upon a lesser amount, that the amount of the operating-differential subsidy for the operation of vessels in an essential service shall equal the excess of the subsidizable wage costs of the United States officers and crews, the fair and reasonable cost of insurance, subsistence of officers and crews on passenger vessels, as defined in section 1183 of this title, maintenance, and repairs not compensated by insurance, incurred in the operation under United States registry of the vessel or vessels covered by the contract, over the estimated fair and reasonable cost of the

same items of expense (after deducting therefrom any estimated increase in such items necessitated by features incorporated pursuant to the provisions of section 1151(b) of this title) if such vessel or vessels were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel or vessels covered by the contract: Provided, however, That the Secretary of Commerce may, with respect to any vessel in an essential bulk cargo carrying service as described in section 1121(b) of this title, pay, in lieu of the operating-differential subsidy provided by this subsection (b), such sums as he shall determine to be necessary to make the cost of operating such vessel competitive with the cost of operating similar vessels under the registry of a

foreign country. For any period during which a vessel cruises as authorized by section 1183 of this title, operating-differential subsidy shall be computed as though the vessel were operating on the essential service to which the vessel is assigned: Provided, however, That if the cruise vessel calls at a port or ports outside of its assigned service, but which is served with passenger vessels (as defined in section 1183 of this title) by another subsidized operator at an operating-differential subsidy rate for wages lower than the cruise vessel has on its assigned essential service, the operating-differential subsidy rates for each of the subsidizable items for each day (a fraction of a day to count as a day) that the vessel stops at such port shall be at the respective rates appli-

cable to the subsidized operator regularly serving the area.

(c)(1) When used in this section --

(A) The term "collective bargaining costs" means the annual cost, calculated on the basis of the per diem rate of expense as of any date, of all items of expense required of the applicant through collective bargaining or other agreement, covering the employment of United States officers and crew of a vessel, including payments required by law to assure old-age pensions, unemployment benefits, or similar benefits and taxes or other governmental assessments on crew payrolls, but excluding subsistence of officers and crews on vessels other than passenger vessels as defined in section 1183 of this title and costs relating to:

(i) the officers or members of the crew that the Secretary of Commerce has found, prior to the award of a contract for the construction or reconstruction of a vessel, to be unnecessary for the efficient and economical operation of such vessel: Provided, That the Secretary of Commerce shall afford representatives of the collective-bargaining unit or units responsible for the manning of the vessel an opportunity to comment on such finding prior to the effective date of such finding: And provided further, That in determining whether officers or members of the crew are necessary for the efficient and economical operations of such vessel, the Secretary of Commerce shall give due consideration to, but shall not be bound by, wage and manning scales

and working conditions required by a bona fide collective-bargaining agreement, or

(ii) those officers or members of the crew that the Secretary of Commerce has found,prior to ninety days following October 21, 1970, to be unnecessary for the efficient and economical operation of the vessel.

(B) The term "base period costs" means for the base period beginning July 1, 1970, and ending June 30, 1971, the collective bargaining costs as of January 1, 1971, less all other items of cost that have been disallowed by the Secretary of Commerce prior to ninety days following October 21, 1970, and not already excluded from collective-bargaining costs under subparagraph (A) (i) or (A) (ii) of this subsection. In any subsequent base period the term

"base period costs" means the average of the subsidizable wage cost of United States officers and crews for the preceding annual period ending June 30 (calculated without regard to the limitation of the last sentence of paragraph (D) of this subdivision but increased or decreased by the increase or decrease in the index described in subdivision (3) of this subsection from January 1 of such annual period to January 1 of the base period), and the collective-bargaining costs as of January 1 of the base period: Provided, That in no event shall the base period cost be such that the difference between the base period cost and the collective-bargaining costs as of January 1 of any base period subsequent to the first base period exceeds five-fourths of 1 per centum of

the collective-bargaining costs as of such January 1 multiplied by the number of years that have elapsed since the most recent base period.

(C) The term "base period" means any annual period beginning July 1, and ending June 30 with respect to which a base period cost is established.

(D) The term "subsidizable wage costs of United States officers and crews" in any period other than a base period means the most recent base period costs increased or decreased by the increase or decrease from January 1 of such base period to January 1 of such period in the index described in subdivision (3) hereof, and with respect to a base period means the base period cost. The subsidizable wage costs of United States officers and crews in

any period other than a base period shall not be less than 90 per centum of the collective-bargaining costs as of January 1 of such period nor greater than 110 per centum of such collective-bargaining costs.

(2) The Secretary of Commerce shall determine the collective-bargaining costs on ships in subsidized operation as of January 1, 1971, and as of each January 1 thereafter, and shall as of intervals of not less than two years nor more than four years, establish a new base period cost, except that the Secretary shall not establish a new base period unless he announces his intention to do so prior to the December 31 that would be included in the new base period.

(3) The Bureau of Labor Statistics

shall compile the index referred to in subdivision (1). Such index shall consist of the average annual change in wages and benefits placed into effect for employees covered by collective-bargaining agreements with equal weight to be given to changes affecting employees in the transportation industry (excluding the offshore maritime industry) and to changes affecting employees in private nonagricultural industries other than transportation. Such index shall be based on the materials regularly used by the Bureau of Labor Statistics in compiling its regularly published statistical series on wage and benefit changes arrived at through collective bargaining. Such materials shall remain confidential and not be subject to disclosure.

(d) Each foreign wage cost computation shall be made after an opportunity is given to the contractor to submit in writing and in timely fashion all relevant data within his possession. In making the computation, the Secretary shall consider all relevant matter so presented and all foreign wage cost data collected at his request or on his behalf. Such foreign cost data shall be made available to an interested contractor, unless the Secretary shall find that disclosure of the data will prevent him from obtaining such data in the future. In determining foreign manning for purposes of this section, the foreign manning determined for any ship type with respect to any base period shall not be redetermined until the beginning of a new base period.

(e) The wage subsidy shall be payable monthly for the voyages completed during the month, upon the contractor's certification that the subsidized vessels were in authorized service during the month. The Secretary of Commerce shall prescribe procedures for the calculation and payment of subsidy on items of expense which are included in "collective-bargaining costs" but are not included in the daily rate because they are unpredictably timed.

(f) Ninety percent of the amount of the insurance and maintenance and repair and subsistence of officers and crews subsidy shall be payable monthly for the boyages completed during the month on the basis of the subsidy estimated to have accrued with respect to such voyages. Any such payment shall be made only after there has been fur-

nished to the Secretary of Commerce such security as he deems to be reasonable and necessary to assure refund of any overpayment. The contractor and the Secretary of Commerce shall audit the voyage accounts as soon as practicable after such payment. The remaining 10 percent of such subsidy shall be payable after such audit.

12. 46 U.S.C. §1191:

Additional powers of Secretary for completion of program

Whenever the Secretary of Commerce shall find and determine, and such finding and determination shall be approved by the President of the United States, that the national policy declared in section 1101 of this title, and the objectives set forth in section 1120 of this title, cannot be fully realized within a reasonable time, in

whole or in part, under the provisions of subchapters V and VI of this chapter, the Secretary is authorized and directed to complete his long-range program previously adopted as provided in this subchapter.

13. 46 U.S.C. §1192:

Construction or reconditioning of vessels by Secretary

The Secretary of Commerce is authorized to have constructed in shipyards in the continental United States such new vessels as he shall determine may be required to carry out the objects of this chapter, and to have old vessels reconditioned or remodeled in such yards: Provided, That if satisfactory contracts for such new construction or reconstruction, in accordance with the provisions of this chapter, cannot be

obtained from private shipbuilders, the Secretary is authorized to have such vessels constructed, reconditioned, or remodeled in United States navy yards. For the purposes of this section, the term "continental United States" includes the States of Alaska and Hawaii.

14. 46 U.S.C. §1204:

> Construction and chartering of vessels for unsuccessful routes; purchase of vessel by charterer; purchase price; operation of vessel in foreign trade
>
> If the Secretary of Commerce shall find that any trade route (determined by the Secretary of Commerce to be an essential trade route as provided in section 1121 of this title) cannot be successfully developed and maintained and the Secretary of Commerce's replacement program cannot be achieved

under private operation of such trade route by a citizen of the United States with vessels registered under the laws thereof, without further Government aid in addition to the financial aids authorized under subchapters V and VI of this chapter, the Secretary of Commerce is authorized to have constructed, in private shipyards or in navy yards, the vessel or vessels of the types deemed necessary for such trade route, and to demise such new vessel or vessels on bare-boat charter to the American-flag operator established on such trade route, without advertisement or competition, upon an annual charter hire of not less than 4 per centum of the price (herein referred to as the "foreign cost") at which such vessel or vessels would be sold if constructed

under subchapter V of this chapter plus an amount equal to (i) the sum of a percentage of the depreciated foreign cost computed annually upon the basis of a twenty-five year life of the vessel determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the term of the charter, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. Such charter may contain an option to the charterer to purchase such vessel or vessels from the Secretary of Commerce within five years after delivery thereof under the

charter, upon the same terms and conditions as are provided in subchapter V of this chapter for the purchase of new vessels from the Secretary of Commerce, except that (a) the purchase price shall be the foreign cost less depreciation to the date of purchase based upon a twenty-five year life; (b) the required cash payment payable at the time of such purchase shall be 25 per centum of the purchase price as so determined; (c) the charter may provide that all or any part of the charter hire paid in excess of the minimum charter hire provided for in this section may be credited against the cash payment payable at the time of such purchase; (d) the balance of the purchase price shall be paid within the years remaining of the twenty-five years after the date

of delivery of the vessel under the charter and in approximately equal annual installments, except that the first of said installments, which shall be payable upon the next ensuing anniversary date of such delivery under the charter, shall be a proportionate part of the annual installment, interest to be payable upon the unpaid balances from the date of purchase, at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to

cover administrative costs.

Such charter shall provide for operation of the vessel exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island Territory of the United States, and if the vessel is operated in the domestic trade on any of the above-enumerated services the charterer will pay annually to the Secretary of Commerce that proportion of

one-twenty-fifth of the difference between the domestic and foreign cost of such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year.

15. 46 U.S.C. §1123 (b):

(b) Whenever any contractor under subchapters VI or VII of this chapter receiving an operating-differential subsidy is in default with respect to any mortgage, note, purchase contract, or other obligation to the Secretary of Commerce, or has not maintained, in a manner satisfactory to the Secretary, all of the reserves provided for in this chapter, the Secretary shall have the right to supervise the number and compensation

of all officers and employees of the contractor.

No. 80-907

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY D. LUECK,

Petitioners,

—v.—

FARRELL LINES, INC., and
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT FARRELL LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a private maritime shipping company, which receives subsidies from the United States government and is subject to government regulation, engage in "state action" when, in accordance with an AFL-CIO arbitration award, it recognizes one union as the exclusive bargaining agent for its supervisory deck officers and the United States government was not involved in any way in the company's decision to recognize that union?

2. Does a maritime shipping company that requires its supervisory deck officers to maintain membership in the union recognized as exclusive bargaining agent, in compliance with the union shop provision in the company's contract with the union, infringe the First Amendment right of association of those officers who do not wish to join that union, even though requiring membership is in accordance with an AFL-CIO arbitration award and national labor policy?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY D. LUECK,

Petitioners,

—v.—

FARRELL LINES, INC., and
INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT FARRELL LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Farrell Lines, Inc. opposes the petition for a writ of certiorari. The decision of the Second Circuit Court of Appeals does not conflict with the decision of any other Circuit Court of Appeals and is correct under the holdings of this Court. It presents no issue of law that requires review.

STATEMENT OF THE CASE

The Union Jurisdictional Dispute

This case involves conflicting union representation claims that arose from respondent Farrell Line's acquisition in March, 1978, of American Export Lines, Inc. ("AEL"), a company then in Chapter XI reorganization. Farrell is a private United States flag shipping company. It has had a long-standing collective bargaining relationship covering deck officers with respondent International Organization of Masters, Mates and Pilots ("MMP") and their agreement provides that it shall apply to any ships acquired by Farrell during its term (J.A. 725; J.A. 855).[1]

Plaintiffs are members of defendant Brotherhood of Marine Officers ("BMO"), an affiliate of the Marine Engineers Beneficial Association ("MEBA"). BMO represented the deck officers—including petitioners—on the AEL ships. BMO insisted that it had the right to continue to represent those officers after Farrell acquired AEL, notwithstanding the Farrell-MMP contract. Except for three ships operated by another company, AEL was the only employer with whom BMO had an agreement covering deck officers (J.A. 241-42).[2]

Deck officers are "supervisors" as defined by the National Labor Relations Act. 29 U.S.C. § 152(11). The Act excludes "supervisors" from its protections. 29 U.S.C. § 164(a). Consequently, the National Labor Relations Board did not have jurisdiction to decide the dispute between MMP and BMO.

Farrell attempted to resolve the conflict so that it could purchase AEL. BMO would not accept an orderly solution and

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1 We adopt the abbreviations "J.A." and "App." used by petitioners to refer, respectively, to the Joint Appendix in the Court of Appeals and the Appendices to their Petition.

2 The rivalry between MMP and MEBA, BMO's parent, is a "prolonged struggle" of "intense competition." *International Organization of Masters, Mates & Pilots v. N.L.R.B.*, 575 F.2d 896, 899 (D.C. Cir. 1978).

it threatened to strike unless Farrell assumed the AEL-BMO collective bargaining agreement (J.A. 400-02; J.A. 649-51). However, MMP did agree that Farrell could deal with BMO until there had been a resolution of the conflicting jurisdictional claims under Article XX of the AFL-CIO constitution (J.A. 402; J.A. 698). Article XX is the jurisdictional dispute arbitration procedure binding on both unions by virtue of their AFL-CIO affiliations (J.A. 833-38).

The AEL Acquisition

Farrell initially conditioned its bid for AEL on making satisfactory arrangements with the AEL and Farrell unions "concerning [each] such union's jurisdiction with respect to the manning of the vessels of [Farrell] and Export Lines subsequent to the Final Closing" (J.A. 669). As a consequence of, among other things, MMP's agreement to seek peaceful resolution of the dispute before the AFL-CIO, Farrell deleted that condition from its bid (J.A. 673).

Petitioners selectively quote the transcript of the Bankruptcy Court hearing to try to create the impression that Farrell agreed to accept the BMO contract (Pet., p. 6). Farrell agreed only to accept resolution of the labor dispute in another forum—the AFL-CIO—instead of in the Chapter XI proceedings. Counsel for AEL thus reported (J.A. 672) to the Bankruptcy Court:

> [W]e have discussed the labor problems and we have come to the conclusion that this is not the proper forum to resolve those problems. Whatever contractual arrangements are present with respect to the labor unions will continue along in the merged company and Farrell Lines has agreed to delete their condition.

Farrell was the sole bidder for AEL and on January 11, 1978, the Bankruptcy Court accepted its bid (J.A. 678-79). AEL's Chapter XI plan of arrangement required Farrell to complete the acquisition by the end of March, 1978. On several occasions between January and March, Farrell communicated to BMO that MMP intended to take their dispute to Article

XX arbitration under the auspices of the AFL-CIO (J.A. 391-92; J.A. 402-04). BMO responded that it would take "drastic measures" against Farrell unless Farrell accepted the BMO collective bargaining contract (J.A. 681).

Relying on MMP's agreement to seek a peaceful resolution of the dispute, Farrell acknowledged the BMO contract on March 28, 1978, when it consummated the acquisition of AEL (J.A. 815). A few days before, however, Farrell had reiterated to both unions that it was entering into the agreement with BMO to avoid a strike and that it would be bound by any Article XX determination of the dispute (J.A. 396-98; J.A. 698). Shortly after Farrell completed the acquisition MMP initiated an Article XX proceeding against BMO (J.A. 682-84). BMO counterclaimed against MMP and through its parent union, MEBA, actively participated in the Article XX arbitration (J.A. 103-05; J.A. 686; J.A. 1459-1504; J.A. 1549-50).

The Article XX Arbitration

The Article XX arbitrator issued a decision on July 31, 1978, upholding MMP's claim to be the exclusive representative for all deck officers employed by Farrell (J.A. 850-55). The arbitrator found that "BMO refused to respect the MM&P agreement" and that "in order to avoid a confrontation, Farrell signed a short agreement with BMO continuing the terms" of the AEL-BMO contract (J.A. 853). The arbitrator ruled that "the former [American] Export vessels must be treated as an [accretion] . . . to the Farrell-MM&P bargaining unit, for which MM&P has an established collective bargaining relationship" (J.A. 855). BMO appealed to the AFL-CIO Executive Council, which affirmed the arbitrator's decision on February 28, 1979 (J.A. 856).

Farrell's Recognition of MMP as the Exclusive Bargaining Representative

After the affirmance of the Article XX decision, BMO withdrew its claim to represent the deck officers (J.A. 707-09; J.A. 1552-57). Farrell notified the officers on the former AEL

ships—including petitioners—that thereafter they would have to satisfy MMP membership requirements as a condition of employment (J.A. 692-93). MMP advised the BMO officers that they could retain their positions on Farrell's ships if they joined MMP and paid dues (J.A. 876-80). MMP waived its initiation fee for each BMO officer accepting the offer (*id.*) and permitted the officer to maintain his BMO membership (*id.*). Many BMO officers accepted and they have continued to work for Farrell under the MMP contract (J.A. 474; App. 97a).[3]

This Petition

Petitioners are BMO officers who rejected MMP's offer and refused to accept the AFL-CIO decision. On March 15, 1979, several of them refused peacefully to leave the Staghound, the first Farrell ship to reach port after announcement of the final Article XX decision (J.A. 289-90; J.A. 314-17; App. 98a). The next day they commenced this lawsuit. The District Court consolidated their preliminary injunction motion with the trial on the merits under Rule 65(a)(2), F.R.Civ.P., and held hearings between March 30 and May 7, 1979.

Among the arguments made by petitoners below was that because of federal subsidization and regulation of the maritime industry, Farrell's decision to recognize MMP as exclusive bargaining agent was "state action" that violated their First Amendment right of association. According to petitioners, Farrell could not require membership in MMP as a condition of employment without a prior determination that it was the majority union. The District Court accepted this argument.

Because deck officers are "supervisors" excluded from the operation of the National Labor Relations Act, that statute did

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3 Petitioners contend that Farrell deprived BMO officers of health, vacation and pension benefits under the BMO contract after it recognized MMP as the exclusive bargaining representative (Pet., p. 8 n.7). Farrell and BMO adjusted these matters in another arbitration (J.A. 1552-57) and Farrell long ago paid petitioners in compliance with the arbitration award.

not provide a procedure for determining whether MMP was the majority union. The District Court ordered an election among the deck officers under the supervision of a special master (App. 85a-91a). On appeal by Farrell and MMP, the Second Circuit Court of Appeals reversed that judgment, finding neither "state action" nor, even if there had been "state action," an infringement of petitioners' right of association (App. 92a-141a).

Farrell's Operations Under the Merchant Marine Act

Under the Merchant Marine Act, 46 U.S.C. § 1101 *et seq.*, Farrell receives from the Department of Commerce operating-differential subsidies as reimbursement for the difference between crew wages on its ships and on those of foreign competitors (J.A. 455; 46 U.S.C. § 1173). These subsidies account for only about 12% of all operating expenses (J.A. 470). Farrell does not receive subsidies for such major items as fuel, maintenance and repair, stores and equipment, insurance, canal tolls, cargo handling costs and port and terminal expenses (J.A. 456-59).

No government official participates in the conduct of Farrell's collective bargaining relations (J.A. 459-60). Neither the Commerce Department nor any federal official had a role in Farrell's decision to abide by the Article XX ruling and recognize MMP as the exclusive bargaining agent.

Although petitioners, citing 46 U.S.C. § 1173(b), assert that "[t]he Secretary of Commerce must review Farrell's collective bargaining agreements . . . and determine that they are fair and reasonable and the product of *bona fide*, arm's length collective bargaining" (Pet., p. 14), the statute contains no such provision (J.A. 465-66). With regard to crew wages, 46 U.S.C. § 1173(b) provides only that "the amount of the operating-differential subsidy . . . shall equal the excess of the subsidizable wage costs of the United States officers and crews . . . over the estimated fair and reasonable cost of the same items of expense . . . if such vessel or vessels were operated

under the registry of a foreign country whose vessels are substantial competitors . . . ." The statute directs the Secretary of Commerce to determine "subsidizable wage costs" in accordance with an index prepared by the Bureau of Labor Statistics (J.A. 465-66; 46 U.S.C. §§ 1173(c)(1)(D), (c)(2) and (c)(3)). The Secretary does not review the reasonableness of Farrell's collective bargaining agreements in calculating its subsidy (J.A. 465-66).

The Commerce Department has established minimum manning and wage scales for vessels receiving an operating-differential subsidy. 46 U.S.C. § 1131(a); 46 C.F.R. § 262.11. These minimum scales do not restrict Farrell's power to pay higher wages. 46 C.F.R. § 262.2. As a practical matter, the government's minimum scales have no effect on a maritime employer's relations with the deck officer unions. The MMP and BMO contracts both provide wages far above the government's scales (*compare* 46 C.F.R. § 262.11 *with* J.A. 731-32; J.A. 790-92).

The Commerce Department no longer supervises the signing of ship's articles by crew members at the beginning of each voyage. Congress has eliminated the Office of the Shipping Commissioner, which had performed that function. *Department of Transportation and Related Agencies Appropriation Act, 1980*, PL 96-131, Title I, 93 Stat. 1023 (1979).

The Commerce Department partially subsidizes the construction of Farrell's ships to meet the lower cost of foreign shipbuilders (J.A. 463-64; 46 U.S.C. §§ 1151, 1152). The Department pays the subsidies to the United States shipbuilders, not to Farrell (J.A. 463; 46 U.S.C. §§ 1152, 1155). To purchase a ship Farrell must pay at least 25% cash and amortize the remainder over twenty-five years with interest at the prevailing market rate for United States obligations. 46 U.S.C. § 1152(c). Farrell owns the ships and their equipment (J.A. 459).

Congress has declared that a primary objective of the subsidy program is to maintain private ownership in the maritime industry, 46 U.S.C. § 1101(c), and that the success of the

program depends upon "substantial private capital investment . . . ." 1970 U.S. Code Cong. & Admin. News at 4196. The United States government can requisition Farrell's ships in time of national emergency, but in such case Farrell, like any private property owner, would be entitled to "just compensation for the property taken or for the use of such property . . . ." 46 U.S.C. § 1242(a).

The Secretary of Commerce may require at the government's expense design features in subsidized ships "suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." 46 U.S.C. § 1151(b). These design features represent an insignificant element of the cost of construction. For example, in 1977, the last year for which statistics were available at the time of trial, they accounted for about one-tenth of one percent of the cost of five container ships then under construction for AEL and Farrell (J.A. 860-61).

The Commerce Department specifies minimum and maximum sailings permitted yearly on a subsidized route, but within those limits Farrell alone determines the number of annual trips (J.A. 460). The Department does not regulate Farrell's use of non-subsidized vessels on non-subsidized trade routes (J.A. 461). The United States government does not receive preferential treatment when shipping cargo on Farrell's ships (J.A. 461-62).

No government official participates in the operation of Farrell's fleet (J.A. 459-60). The Commerce Department does not maintain officials aboard Farrell's ships (J.A. 459).

REASONS FOR DENYING THE WRIT

The Second Circuit Court of Appeals decided that Farrell's recognition of MMP as exclusive bargaining agent was not "state action" and, even if there had been "state action," that Farrell did not infringe petitioners' right of association. Both bases for the Court's decision are consistent with the holdings of the other Circuit Courts of Appeals and correct under the decisions of this Court. Either is ground for denying the writ.

I.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS THAT THERE WAS NO STATE ACTION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OF APPEALS AND IS CORRECT UNDER THE HOLDINGS OF THIS COURT. PETITIONERS' STATE ACTION CLAIM DOES NOT PRESENT AN ISSUE OF LAW THAT REQUIRES REVIEW.

The other courts that have considered the question have also held that the collective bargaining practices of maritime employers do not involve "state action." *Rodriguez v. Conagra, Inc.*, 527 F.2d 540 (1st Cir. 1976); *Burke v. Mathiasen's Tanker Industries, Inc.*, 393 F. Supp. 790 (E.D. Pa. 1975). There is no conflict between the Second Circuit and any other court.

Petitioners do not even claim a conflict. They assert only that the Second Circuit's holding is "contrary to" (Pet., p. 17) the factually different decisions of *McQueen v. Druker*, 438 F.2d 781 (1st Cir. 1971), *Braden v. University of Pittsburgh*, 552 F.2d 948 (3d Cir. 1977), *Wimbish v. Pinellas County, Florida*, 342 F.2d 804 (5th Cir. 1965), and *Hampton v. City of Jacksonville*, 304 F.2d 320 (5th Cir.), *cert. denied sub nom. Ghioto v. Hampton*, 371 U.S. 911 (1962).

McQueen, *Braden*, *Wimbish* and *Hampton* all involved claims of discrimination on property owned or controlled by a

governmental body. In *Braden*, additionally, government officials sat on the university's board of trustees and the State legislature had declared the university an instrumentality of the State. 552 F.2d at 964-65. These cases fall within the rule of *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 726 (1961), that under certain circumstances the private use of public property or the holding out of the private entity as a public body is "state action." *See also Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 174-75 (1972).

There are no such indicia of government control in this case. Farrell owns its ships and their equipment. No government official participates in the operation of Farrell's fleet or in the conduct of its collective bargaining relations. No government official had a role in Farrell's decision to abide by the AFL-CIO Article XX ruling and recognize MMP as the exclusive bargaining agent.

On this record, the Second Circuit Court of Appeals held that, notwithstanding federal subsidization and regulation of the maritime industry, there was no "state action" because "factors in addition to government funding and regulation must be present" (App. 123a) (citation omitted). The Second Circuit's analysis is consistent with the other Courts of Appeals that have addressed the issue. *See Bethel v. Jendoco Construction Corp.*, 570 F.2d 1168, 1176-77 (3d Cir. 1978) (allegations of funding and regulation, "without a good deal more, . . . insufficient to bring the defendant companies' conduct within the purview of § 1983"); *Madry v. Sorel*, 558 F.2d 303 (5th Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978) (hospital's suspension of physician's staff privileges not "state action," notwithstanding public funding and regulation); *Briscoe v. Bock*, 540 F.2d 392, 395-96 (8th Cir. 1976) (hospital's dismissal of physician not "state action," notwithstanding public funding and regulation); *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308, 314 (9th Cir. 1974) (public funding and regulation of hospital "do not provide a basis for a § 1983 suit"); *Jackson v. Norton-Children's Hospitals, Inc.*, 487 F.2d 502, 502-03 (6th Cir. 1973),

cert. denied, 416 U.S. 1000 (1974) (hospital's dismissal of physician "did not constitute state action," notwithstanding public funding and regulation); *Doe v. Bellin Memorial Hospital*, 479 F.2d 756, 761 (7th Cir. 1973) (Stevens, J.) ("The facts that defendants have accepted financial support, as alleged, from both the federal and state governments, and that the hospital is subject to detailed regulation by the State, do not justify the conclusion that its conduct, which is unaffected by such support or such regulation, is governed by § 1983").

Petitioners raise no important issue of law that merits Supreme Court review. This Court has already fully delineated the considerations applicable in determining "state action." *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961).

The Court of Appeals did not, as petitioners contend, invite review with its comment that the "question is a close one" (App. 125a). It was merely expressing the view, often voiced by this Court, that each "state action" case turns on its own "peculiar facts," *Burton*, 365 U.S. at 726, and that the question "frequently admits of no easy answer." *Jackson*, 419 U.S. at 350 (citations omitted). Petitioners' disagreement with the Second Circuit's analysis of the facts is not a basis for issuing the writ. This Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

The decision of the Court of Appeals is correct under the holdings of this Court. *Jackson* explains that in determining "state action" "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." 419 U.S. at 351 (citation omitted). A "nexus" exists where the private entity performs a "state function," *id.* at 352-53, the State places its "imprimatur" on the challenged private activity, *id.* at 357, or

the private entity and the State are in a "symbiotic relationship." *Id.* at 357-58.

The Court of Appeals found that, although the maritime industry serves the public interest, Farrell does not perform a state function because operating a merchant marine "has never been a function exclusively reserved to government" (App. 116a). This finding accords with *Jackson*, which instructs that a private entity performs a state function only when it exercises powers "traditionally exclusively reserved to the State," 419 U.S. at 352, and not when it merely engages in a business affected with the public interest. *Id.* at 352-53.

The Court of Appeals also held that although the United States government regulates the maritime industry, it did not place its "imprimatur" on Farrell's recognition of MMP because no federal official directly authorized or ordered Farrell to take that step (App. 124a-125a). *Jackson* likewise holds that, absent direct government involvement in the challenged private activity, even pervasive regulation "does not transmute a practice initiated by the [private entity] . . . into 'state action.' " 419 U.S. at 357. *See also Moose Lodge*, 407 U.S. at 176-77 (detailed regulation of private club insufficient to establish "state action" because regulation did not "in any way foster or encourage" challenged conduct).

The Court of Appeals did not find a "symbiotic relationship" between Farrell and the United States government because the Merchant Marine Act preserves Farrell's private character (App. 120a-124a). Farrell owns its ships. No government official participates in the operation of Farrell's fleet. The government does not derive any economic benefit from Farrell's operations. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), in contrast, involved complete physical, financial and economic interdependence between the government agency and the private business. *See Jackson*, 419 U.S. at 357-58; *Moose Lodge*, 407 U.S. at 174-75 (each distinguishing the special circumstances of *Burton*).

The Court of Appeals did not err in not finding "state action" based on the aggregate circumstances. This Court rejected the same argument in *Jackson*, holding that facts insufficient to show "state action" under any of the individual tests cannot in the aggregate "connect the State . . . with respondent's action so as to make the latter's conduct attributable to the State. . . ." 419 U.S. at 358.

II.

THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS THAT THERE WAS NO INFRINGEMENT OF PETITIONERS' FIRST AMENDMENT RIGHT OF ASSOCIATION DOES NOT RAISE AN IMPORTANT ISSUE AND IS CORRECT UNDER THE HOLDINGS OF THIS COURT.

Petitioners also seek review of the Second Circuit's holding that Farrell did not violate their right of association. The Court's finding of no "state action" obviates the need even to consider the First Amendment argument, because without "state action" Farrell is not subject to constitutional restrictions. In any event, the decision of the Court of Appeals raises no important First Amendment question and is correct under the holdings of this Court.

Petitioners do not show an infringement of their associational rights. They do not claim that membership in MMP would interfere with their political or ideological beliefs (App. 130a). Nor do they contend that they have a constitutional right to be represented by their former union, for they acknowledge that "the First Amendment [does not compel] Farrell to bargain with a union of supervisors . . ." (Pet., p. 28). Their claim is only that the First Amendment prohibits Farrell from enforcing the union shop provisions of the MMP contract without a prior determination that MMP is the majority union (Pet., p. 28).

This claim does not raise an issue for review. In *Lathrop v. Donohue*, 367 U.S. 820, 843 (1961), a majority of this Court (the plurality and Justices Harlan and Frankfurter, concurring) agreed that compulsory membership in an association that required only payment of annual dues and did not interfere with an individual member's beliefs, was not an "impingement upon protected rights of association." *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 313 (1979), held that a state-instituted procedure for selecting an exclusive bargaining agent that interfered with majority rule "presents as a general matter no First Amendment problems" (footnote omitted).

Even assuming that compulsory membership in MMP would raise a First Amendment issue, the Court of Appeals correctly found that such a limited intrusion was "outweighed by the countervailing government interests" (App. 137a). Petitioners are "supervisors" under the National Labor Relations Act. 29 U.S.C. § 152(11). Congress has excluded "supervisors" from the operation of the Act, including the provisions concerning self-determination. *Hanna Mining Co. v. District 2, M.E.B.A.*, 382 U.S. 181, 188 (1965). This exclusion frees an employer from any obligation to recognize the union preferences of its supervisory personnel. *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974); *Hanna Mining Co. v. District 2, M.E.B.A.*, *supra*.

The Court of Appeals held that the petitioners could not use the First Amendment to circumvent this express congressional policy (App. 126a-131a). This holding comports with *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464 (1979), which instructs that "the First Amendment is not a substitute for the national labor relations laws." The Second Circuit's decision is also consistent with *Hanover Township Federation of Teachers Local 1954 v. Hanover Community School Corp.*, 457 F.2d 456, 461 (7th Cir. 1972), cited approvingly in *Smith*, where then Circuit Judge Stevens held that even when a government employer acts "to undermine the

economic strength of the union," the economic activities of the union members "are not protected by the First Amendment." [4]

The Court of Appeals also considered the disruptive effect on Farrell's operations if it were compelled to maintain rival groups of supervisory personnel on its ships (App. 135a-137a). A public employer, like a private employer, may enforce a union shop provision to avoid "facing conflicting demands from different unions, and . . . to reach agreements and settlements that are not subject to attack from rival labor organizations." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977). This consideration is particularly important for ship's deck officers, because as supervisory personnel they are "obliged to be loyal to their employer's interests . . . ." *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653, 660 (1974).

The Court of Appeals also held that the national policy favoring arbitration of labor disputes supported Farrell's decision to enforce the MMP contract (134a-135a). Farrell recognized MMP as exclusive bargaining agent in accordance with the AFL-CIO Article XX ruling, which was binding on both MMP and BMO by virtue of their AFL-CIO affiliations. The Court of Appeals properly accorded the arbitration award especial significance because deck officers are "supervisors" and "[n]o other administrative forum was readily available to resolve this dispute that had importance not only to the

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4 Citing *Hanover*, petitioners assert that "[i]f the Constitution proscribes the discharge of a public employee because of his membership in a union, it must certainly protect an employee discharged for his refusal to join a union" (Pet., p. 22) (footnote omitted). The portion of *Hanover* quoted by petitioners (Pet., p. 21) dealt with discharges in retaliation for union activities. There is no such claim in this case. "Petitioners were discharged by Farrell solely for their refusal to join MMP" (Pet., p. 20), not because they preferred another union. Contrary to the conclusion drawn by petitioners, a public employer may, consistent with the First Amendment, enforce a union shop provision and require union membership as a condition of employment. *Abood v. Detroit Board of Education*, 431 U.S. 209, 217-23 (1977).

interested parties but to others similarly situated throughout the nation" (App. 134a).

Finally, the Court of Appeals found Farrell's recognition of MMP analogous to the policy applied by the NLRB to maritime employees covered by the National Labor Relations Act (App. 133a-134a). Under its so-called "accretion doctrine" the NLRB holds that in a shipping industry acquisition like Farrell's acquisition of AEL, the purchasing company's union has the right to man the newly acquired ships. *Moore-McCormack Lines, Inc.*, 139 N.L.R.B. 796, 798-99 (1962); *Quarterly Report of N.L.R.B. General Counsel*, 100 L.R.R. 259, 266 (April 2, 1979). The NLRB applies this rule because ship transfers are common in the industry and the "accretion doctrine" avoids constant disruption. *Moore-McCormack Lines, Inc., supra*; *N.L.R.B. v. National Maritime Union*, 486 F.2d 907, 913 (2d Cir. 1973), *cert. denied*, 416 U.S. 970 (1974). In giving weight to NLRB policy, the Second Circuit followed this Court's admonition that "the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems." *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 316 (1965).

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1980

No. 80-907

WILLIAM JENSEN, EDWIN KREMER, JOHN GARDELLA, WILLIAM KUYL, DOMINICK BISBANO, LINDSAY HOYT, FRANCIS S. HAGGERTY, RICHARD TRIPPE, ANTHONY LORE and GARY D. LUECK,

Petitioners,

v.

FARRELL LINES, INC., and INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS IN OPPOSITION

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Questions Presented

1. Whether a group of supervisors, who have served aboard vessels which have been acquired by another company and who are members of a union which has lost an arbitration over representation rights, have a First Amendment right to an election to determine the majority union representative before the union security provisions of the employer's collective bargaining agreement may validly be applied to them.

2. Whether the actions of a private shipping company constitute "state action" within the meaning of the First Amendment by reason of the company's receipt of government subsidies under the Merchant Marine Act of 1970.

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IN THE

Supreme Court of the United States

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BRIEF FOR INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS IN OPPOSITION

Statement of the Case

Farrell Lines, Inc., a major United States flag shipping line, and MM&P, a labor organization representing licensed deck officers in the American merchant marine, have had a long-established collective bargaining relationship covering the deck officers aboard all Farrell vessels.[1] Their collective

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[1] Although licensed deck officers are concededly supervisors and not statutory "employees" within the meaning of the National Labor Relations Act, MM&P does include some employees among its members and has, therefore, been held to constitute a "labor organization" under the NLRA. *National Marine Engineers Bene-*

agreements expressly cover after-acquired vessels—that is, ships acquired by Farrell after the effective date of the collective agreement. They also contain standard union security provisions which require all deck officers aboard all Farrell vessels to be members of the MM&P (JA 390-393, 710-784).

Plaintiffs are members of the Brotherhood of Marine Officers ("BMO"), a labor organization consisting essentially of licensed deck officers and licensed engineers who were employed by a single company, American Export Lines, Inc. ("AEL"). BMO had a long-standing bargaining relationship with AEL, but prior to 1978 had no relationship whatever with Farrell (JA 785-812).

In 1977 AEL's parent company filed a bankruptcy petition, and in the ensuing proceeding, it was determined that AEL would be auctioned to the highest responsible bidder. In certain personnel classifications, Farrell and AEL dealt with different labor organizations, and Farrell was reluctant to embark upon an acquisition that might lead to labor strife and disrupt its own existing operations. Accordingly, before bidding, it approached the various contesting organizations in an effort to work out a *modus operandi* that would avoid jurisdictional warfare (JA 391-394, 400-403, 698).

All of the contesting unions, either directly or through parent organizations, were affiliates of the AFL-CIO and subject to the Internal Disputes Plan contained in Article XX of the AFL-CIO Constitution. That Plan provides for mandatory arbitration to resolve precisely the type of jurisdictional controversy anticipated from the proposed Farrell acquisition of AEL (JA 832-838, 850-855).

BMO threatened to strike Farrell unless its contract was applied to the former AEL vessels and its members hired

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ficial Association v. *NLRB*, 274 F.2d 167 (2d Cir. 1960); ***MM&P*** v. *NLRB (Marine & Marketing Int'l)*, 486 F.2d 1271 (D.C. Cir. 1973), *cert. den'd*, 416 U.S. 956 (1974). So, too, is BMO.

as deck officers on those vessels. Had MM&P taken the same position, Farrell would have abandoned its plans, and the entire AEL fleet would probably have been sold to foreign interests and lost to the American merchant marine. Accordingly, to enable Farrell to proceed, Farrell and MM&P agreed to a procedure under which Farrell would permit BMO officers to man the vessels in the first instance; MM&P would press its representation claims solely through arbitration proceedings under Article XX of the AFL-CIO Constitution and not through economic action; and both Farrell and MM&P would agree to be bound by the arbitral determination of AFL-CIO. Farrell thereupon entered the auction in the Bankruptcy Court and, having emerged as the successful bidder, proceeded to consummate the purchase (JA 400-402, 698).

BMO was fully aware of MM&P's contract and representational claims and MM&P's intent to invoke Article XX proceedings (JA 391-404, 698).

On March 28, 1978, Farrell formally acquired AEL and simultaneously merged it into Farrell. Thereafter, pending the anticipated Article XX proceedings, Farrell executed a contract with BMO and kept the BMO deck officers aboard the ships acquired from AEL. Upon expiration of its agreement with MM&P on June 15, 1978, Farrell entered into a successor agreement containing the same broad coverage, including applicability to "after-acquired vessels", and the same union security provisions[2] (JA 391-404, 695, 710-784, 813-815).

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[2] At the time of the acquisition in March 1978, the number of MM&P-contract vessels and BMO-contract vessels was substantially equal, with perhaps a slight numerical superiority in favor of MM&P. During the ensuing year, Farrell disposed of some former AEL ships, thus increasing MM&P's margin. At the time of the final decision in the Article XX proceeding, there were 20 to 22 active MM&P ships and either 17 to 18 active BMO ships, depending on the method of calculation (JA 695-697).

On April 13, 1978, within two weeks of Farrell's acquisition of the AEL fleet, MM&P's parent, the International Longshoremen's Association ("ILA"), filed its Article XX complaint with the AFL-CIO. BMO and its parent, the Marine Engineers Beneficial Association ("MEBA"), filed a countercomplaint asserting their own representation claims. After hearing and extensive briefing, the arbitrator rendered a decision in favor of ILA-MM&P, based largely upon the doctrine of accretion which not only underlies firmly established Article XX precedent but also represents the cornerstone of NLRB doctrine in ship transfer cases in the American maritime industry. *Moore-McCormack Lines, Inc.*, 139 NLRB 796 (1962); *National Maritime Union (Puerto Rico Marine Management, Inc.)*, 227 NLRB 20 (1976); *National Maritime Union (Overseas Carrier Corp.)*, 174 NLRB 216 (1969)[3] (JA 103-106, 850-855).

Pursuant to procedures prescribed in the AFL-CIO Constitution, MEBA-BMO appealed the award, thus securing an automatic stay. After oral argument and further briefing, on February 28, 1979, the AFL-CIO appellate tribunal affirmed the arbitrator; and under the AFL-CIO Constitution, the arbitral determination in favor of ILA-MM&P became fully effective (JA 832-839, 856).

MM&P having fulfilled its commitment to Farrell by allowing BMO deck officers to man the former AEL vessels throughout the year-long pendency of the Article XX proceeding without resorting to economic action permissible

[3] Although NLRB representation doctrine does not apply to supervisors, and MM&P-contract vessels predominated over former AEL BMO-contract ships in the enlarged Farrell fleet, it should be noted that in the maritime industry, the NLRB applies the accretion principle irrespective of the relative sizes of the two fleets. Specifically, the NLRB permits a larger unit to accrete into the purchaser's smaller unit. See *Delta Steamship Lines, et al.*, Case Nos. 2-CA-15677 et al., BNA Labor Relations Reporter, 100 LRR 259, 265-266 (1979).

under its contract, Farrell then proceeded to honor its part of the understanding. On March 12, 1979, Farrell applied the MM&P contract to all vessels acquired by it from AEL (JA 283, 284, 306, 878).

In accordance with the accretion principle, it is the customary, almost universal, practice in the maritime industry that when ships are transferred to a company having a collective agreement with a different union, the personnel in that classification are promptly replaced by members of the acquiring company's union, dispatched out of its hiring hall. This is a natural consequence of the typical maritime collective agreement which provides that all jobs in the covered classification are to be filled, on a specified seniority basis, out of the contracting union's hiring hall, subject to union security conditions. Members of another union invariably lack the requisite seniority and the requisite membership.

Although the wholesale displacement of personnel who formerly serviced an acquired vessel or fleet of vessels has been accepted under both Article XX and NLRB procedures,[4] MM&P did not follow the standard practice. Instead of insisting upon the displacement of the BMO deck officers by MM&P members, it offered all BMO members the right to continue in Farrell employment under the MM&P contract if they would simply join MM&P and thus satisfy the union security requirement of the Farrell-MM&P agreement. There was no requirement that they relinquish their membership in BMO. MM&P also offered to waive its entire

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[4] Efforts to forestall such displacement by contractual means have been administratively and judicially condemned under both the labor laws and the antitrust laws. *NLRB* v. *National Maritime Union*, 486 F. 2d 907 (2d Cir. 1973), *cert. den'd*, 416 U.S. 970 (1974); *MM&P* v. *NLRB (Seatrain Lines, Inc.)*, 575 F. 2d 896 (D.C. Cir. 1978); *Commerce Tankers Corp.* v. *National Maritime Union*, 553 F. 2d 793 (2d Cir. 1977), *cert. den'd* 434 U.S. 923 (1977).

initiation fee, and to accord BMO deck officers the highest contractual seniority status aboard all former AEL vessels (JA 474-477, 478-480, 710-784, 876-880).

As former AEL vessels completed their voyages and the crew's articles terminated, this offer was transmitted to their deck officers. Many BMO members joined MM&P, and they have continued in their employment aboard Farrell ships. Other BMO members, influenced by the importunings of plaintiffs and other BMO representatives who met each ship as it arrived, declined to join MM&P; and they were replaced by MM&P deck officers through normal end-of-voyage procedures. This action followed (JA 243, 245-247, 474, 876-880).

ARGUMENT

The Decision Below Is Correct, in Accord With the Decisions of This Court and of Other Circuits, and Presents No Issue of General Importance.

The decision below rests on two alternative grounds. Although the application of "state action" principles to the subsidized maritime industry may raise a factual question, the First Amendment claim raises no substantial issue, factual or legal. The Court of Appeals' determination of that issue follows well-established principles, reaffirmed as recently as 1979, accords fully with the decisions of this Court, and raises no conflict with other circuits. It presents no novel questions.

Thus, whatever the disposition of the "state action" issue, the judgment below would stand, for the alternative holding, which does not merit review, is sufficient to support it. Under such circumstances, certiorari is inappropriate. Stern & Grossman, *Supreme Court Practice*, pp. 271-272, 371, and cases therein cited.

Moreover, the "state action' issue does not itself warrant review. The merchant marine subsidy program has been in effect for decades. During all this period there have apparently been only two other martime subsidy cases which have given rise to a Constitutional "state action" question, ith results identical to the decision below. (See Farrell brief in opposition to Petition). Thus the decision below, even on the "state action" point, raises no important issue of federal law.[5]

1. In *Beasley* v. *Food Fair of North Carolina,* 416 U.S. 653, 655 (1974), this Court held:

> "Taft-Hartley amendments of the National Labor Relations Act excluded supervisors from the protections of the Act and thus freed employers to discharge supervisors without violating the Act's restraints against discharges on account of labor union membership."

The Court has insisted upon strict compliance with the Congressional mandate and has refused to permit any tribunal, state or federal, to accord supervisors "the anomalous status of employees" (416 U.S. 662, quoting the legislative history), and the rights secured to statutory employees by the NLRA.

In *Beasley,* a group of supervisors joined a statutory "labor organization" and were promptly fired for doing so. After reviewing the legislative history and purpose of the 1947 amendments, this Court held that Section 14(a) of the Act prohibited the invocation of a state cause of action

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[5] MM&P did not brief the "state action" issue in either the District Court or Court of Appeals, relying upon the presentation of defendant Farrell Lines on this point. We shall adopt essentially the same posture on the present petition. We urge that the "state action" disposition below is correct and in any event does not warrant review, and we adopt the arguments of Farrell on that aspect of the case.

based on wrongful discharge for union activities.[6] *Beasley* involved a far more direct, frontal assault upon associational rights of supervisors than the instant case which arose out of the implementation of a conventional union security provision in the contract of a union which had won the kind of arbitration strongly favored by national labor policy. *Carey* v. *Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

Petitioners would reintroduce through Constitutional doctrine precisely the election and job protection rights which Congress deliberately withdrew from supervisors in 1947. In effect, therefore, they wish this Court to invalidate a fundamental portion of the NLRA, on the books since 1947, and consistently applied by both the Courts and the NLRB, not only in *Beasley* but in a multitude of other decisions. *E.g., Hanna Mining Co.* v. *District 2, MEBA*, 382 U.S. 181 (1965); *Marine Engineers* v. *Interlake Co.*, 370 U.S. 173 (1962); *Great Lakes Towing Co.*, 168 NLRB 695 (1967).

2. The legislative history of the Taft-Hartley amendments demonstrates Congressional awareness that supervisors would not be barred from forming unions and that some employers would continue to deal with unions representing supervisors. The dominant purpose of those amendments was to assure that in such dealings, no claim of legal right to majority selection or job protection could be asserted, in any tribunal, and that any disputes arising out of supervisory organization or representation would be settled by the process of self-help, not the legal process. In short, in withdrawing from supervisors the legal pro-

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[6] Because the *Beasley* decision rested on the command of a federal statute which nullified an otherwise tenable state claim, "state action" was clearly present. See *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 218-219, n.12 (1977).

tection of the NLRA, there was to be no distinction between the situation in which an employer declines to recognize a union and that in which he is willing on his own terms to allow supervisory unionism and to bargain collectively. 1 Legslative History of the Labor Management Relations Act 1947, pp. 308, 411, 1008; Cox, *The Labor-Management Relations Act,* 61 Harv. L. Rev. 1, 4-5 (1947).

3. In a series of decisions under § 8(b)(1)(B) of the Act, another Taft-Hartley amendment distinguishing supervisors from statutory employees, the NLRB has held that (1) employers may deal with the maritime supervisory union they wish, (2) they may base that choice on the fact that one union offers them a more favorable labor contract, (3) they may enter into pre-hire agreements containing stringent union security provisions with that union; (4) they may summarily discharge members of another union who have been serving aboard the vessel for years, without regard to the quality of their job performance, and simply because they belong to the "wrong" union; and (5) any economic action, or even litigation, against the employer by the disfavored labor organization, constitutes an unfair labor practice under Section 8(b)(1)(B). Each of these holdings has been affirmed by a Court of Appeals; and this Court has denied certiorari. *MM&P* v. *NLRB (Marine & Marketing Int'l),* 486 F.2d 1271 (D.C. Cir. 1971), *cert. denied,* 416 U.S. 956 (1974), *MM&P* v. *NLRB (Westchester Marine Shipping),* 539 F.2d 554 (5th Cir. 1976), *cert. denied,* 434 U.S. 828 (1977); *MM&P* v. *NLRB (Cove Tankers Corp.),* 575 F.2d 896 (D.C. Cir. 1978); *Newport Tankers Corp.* v. *NLRB,* 575 F.2d 477 (4th Cir. 1978), *cert. denied,* 439 U.S. 928 (1978).

In none of these cases did the deck officers ever exercise any choice of bargaining representative nor did they have opportunity to do so. In *Marine & Marketing,* the Court

specifically noted that the employer's agreement with the favored union was "pre-hire," that is, it was made before any deck officers had been engaged. (486 F.2d at 1272).

The contention that deck officers have a right to select their bargaining representative when the shipowner chooses to recognize and bargain with a supervisory union was explicitly addressed and rejected by the Fifth Circuit in *Westchester Marine Shipping,* 539 F.2d at 560. In the subsequent *Cove Tankers* decision, the District of Columbia Court of Appeals adopted the holding and "excellent reasoning" of *Westchester Marine Shipping.* See 575 F.2d at 905.

In *Cove Tankers Corp.,* moreover, MM&P did raise a First Amendment constitutional challenge to the construction being accorded Section 8(b)(1)(B). The Court of Appeals rejected this contention, citing *Beasley,* and holding "that the burdens on first amendment associational rights imposed by Section 8(b) are outweighed by the countervailing governmental interests," 575 F.2d at 905.

The decision below cited these decisions and is fully consistent with them.

4. The First Amendment has nothing to do with the vindication of majority rights. Rather it is designed to protect rights of the minority, the unpopular, even the despised. The notion that union membership may be required through the collective agreement of a majority representative, and receives constitutional validation by a showing of majority selection, is foreign to the First Amendment. If a First Amendment right to reject compulsory unionism were to exist, it would not be lost because the union achieves the support of the majority of the group. But no such right exists, for this Court has squarely held, in the context of state action and true public, governmental

employment,[7] that compulsory unionism does not violate First Amendment rights. *Railway Employes' Department* v. *Hanson* 351 U.S. 225 (1955); *Abood* v. *Detroit Board of Education,* 431 U.S. 209 (1977).[8]

The statutory schemes in *Hanson* and *Abood* provided for representation elections, but that was not the basis of decision. Rather the Court, in both cases, held that the legislative measure "is relevant or appropriate to the constitutional power which Congress exercises", that "the ingredients of industrial peace and labor-management relations are numerous and complex", varying from time to time, and that "The decision rests with the policy makers, not with the judiciary." 351 U.S. at 234.

Although the specific factors influencing the 1947 legislative judgment on treatment of supervisors are different, the same reasoning applies to this case. After considering how the Board and the Courts dealt with the supervisory issue between 1935 and 1947, the Taft-Hartley Congress concluded that in the interest of stability and the proper relationship between supervisors and employers, the protections and procedures of the Act should be withdrawn from supervisory personnel. That judgment, too, falls within the "constitutional power which Congress exercises." Indeed far more serious burdens upon First Amendment rights have been upheld in deference to Congressional judgment in fashioning the basic federal labor statute.

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[7] Farrell is in no sense a unit of government or public employer, whether or not "state action" is implicated. Like any other private shipping company, subsidized or nonsubsidized, Farrell is subject to the NLRA and other federal labor laws; a true public employer is excluded from the coverage of this legislation. NLRA, §2(2).

[8] This case presents no question of political or ideological expenditures, but only traditional collective bargaining, labor relations activity. Thus that aspect of *Abood* which deals with compulsory exactions for ideological ventures has no applicability here.

American Communications Ass'n v. *Douds*, 339 U.S. 382 (1950).

5. In its recent decisions in *Babbitt* v. *United Farm Workers National Union*, 442 U.S. 289 (1979) and *Smith* v. *Arkansas State Highway Employees, Local 1315*, 441 U.S. 463 (1969), this Court drove home the point that "the First Amendment is not a substitute for the national labor laws." 441 U.S. at 464. Moreover, *Babbitt* involved the precise issue of majority representation. Plaintiffs had asserted that Arizona's agricultural representation law and implementing procedures defeated the ability of farm workers to select a majority representative, thus violating their First Amendment associational rights; and the three-judge special court sustained their challenge. This Court reversed, stating that Arizona had no constitutional obligation to provide any procedure for selecting a "chosen representative", and the fact "That it has undertaken to do so in an assertedly niggardly fashion, then, presents as a general matter no First Amendment problems." Complaints as to the ineffectiveness of the election procedures were "matters for the Arizona legislature and not the federal courts." 442 U.S. at 313.

Babbitt rests on the proposition, fatal to petitioners herein, that there is no First Amendment right to majority representation. For if such a right existed, the three-judge court would have been correct in its inquiry into whether the statutory procedures effectively frustrated that choice. This Court did not take issue with the lower court's analysis on that point; rather it held that the inquiry should not have been undertaken at all, that the issue belonged before the Arizona legislature not in the federal courts, and that, in the Court's concluding words, there is no "First Amendment difficulty" whether or not the state procedure is "fair or efficacious". 442 U.S. at 313-314.

In sum, the decision below cuts no new ground and accords with both statutory and Constitutional adjudications. Any other result would not only frustrate the expressed intent of Congress and misperceive the nature and scope of the First Amendment, but would contribute dangerously to industrial instability and undermine the ability of labor organizations to resolve representational disputes through peaceful arbitration. The decision below is not only correct, it furthers national labor policy and raises no substantial issue meriting review.

CONCLUSION

For the foregoing reasons, we respectfully urge that the writ of certiorari be denied.

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